(12)

No. 04-70
Title: Exxon Mobil Corporation, Petitioner
v.
Allapattah Services, Inc., et al.
Docketed: July 15, 2004
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (01-15575, 01-16244)
Decision Date: June 11, 2003
Rehearing Denied: March 15, 2004
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 10 2004	Application (03A931) to extend the time to file a petition for a writ of certiorari from June 13, 2004 to July 14, 2004, submitted to Justice Kennedy.
May 13 2004	Application (03A931) granted by Justice Kennedy extending the time to file until July 14, 2004.
Jul 14 2004	Petition for a writ of certiorari filed. (Response due August 16, 2004)
Aug 10 2004	Order extending time to file response to petition to and including August 20, 2004.
Aug 20 2004	Brief of respondents Allapattah Services, Inc., et al. in opposition filed.
Aug 31 2004	Reply of petitioner Exxon Corporation filed. (Distributed)
Sep 1 2004	DISTRIBUTED for Conference of September 27, 2004.
Sep 7 2004	Supplemental brief of respondents Allapattah Services, Inc., et al. filed. (Distributed)
Sep 17 2004	Supplemental brief of petitioner Exxon Corporation filed. (Distributed)
Oct 4 2004	DISTRIBUTED for Conference of October 8, 2004.
Oct 12 2004	Petition GRANTED limited to Question one presented by the petition and is consolidated with No. 04-79. A total of 90 minutes is allotted for oral argument.
Oct 22 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 6, 2004 (VIDED).
Dec 6 2004	Joint appendix filed.
Dec 6 2004	Brief of petitioner Exxon Mobil Corporation filed.
Dec 15 2004	SET FOR ARGUMENT ON Tuesday, March 1, 2005.
Dec 15 2004	CIRCULATED.
Jan 3 2005	Motion for divided argument filed by the petitioner in No. 04-70 and the parties in No. 04-79. VIDED
Jan 6 2005	Extension of time for filing respondents' brief on the merits to and including January 18, 2005.
Jan 10 2005	Motion for divided argument is granted to be divided as follows: 22 ½ minutes for petitioner in No. 04-70; 22 ½ minutes for respondent in No. 04-79; 22 ½ minutes for respondents in No. 04-70; and 22 ½ minutes for petitioners in 04-79. The request to argue the cases seriatim is denied.
Jan 14 2005	Application (04A635) to stay execution of judgment pending the disposition of the petition for writ of certiorari, submitted to Justice Kennedy.
Jan 18 2005	Brief amicus curiae of United States filed. (Distributed)
Jan 18 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED

Jan 18 2005	Brief amicus curiae of Product Liability Advisory Council, Inc. filed. (Distributed)
Jan 18 2005	Brief of respondents Allapattah Services, Inc., et al. filed. (Distributed)
Jan 19 2005	Opposition of Exxon Corporation and Star-Kist Foods to motion of the Acting Solicitor General filed. VIDED
Jan 21 2005	Response to application from respondent Allapattah Services, Inc., et al. filed. (Distributed)
Jan 24 2005	Reply of applicant Exxon Mobil Corporation filed. (Distributed)
Jan 26 2005	Application (04A635) referred to the Court by Justice Kennedy.
Jan 26 2005	Application (04A635) denied by the Court.
Jan 31 2005	Record received from the U.S.C.A. 11th Circuit. (1 envelope)
Feb 17 2005	Reply of petitioner Exxon Mobil Corporation filed. (Distributed)
Feb 18 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Feb 24 2005	Supplemental brief of respondent Allapattah Services, Inc., et al. filed. (Distributed)
Feb 25 2005	Supplemental brief of petitioner Exxon Mobil Corporation filed. (Distributed)

Supreme Court, U.S.
FILED

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No. 04-

IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

July 14, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts with diversity jurisdiction over the individual claims of named plaintiffs to exercise supplemental jurisdiction over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement?

2. Whether Rule 23 of the Federal Rules of Civil Procedure authorizes the certification of a multi-state class action where individual reliance by each class member is at issue and where the predominance of common issues can be established only by distorting the law of the applicable states?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following parties are respondents in this proceeding:

Paul Bove
Martin I. Cook
George Dalton
Richard P. Durishin
Alberto Gonzalez
G.G.S.K., Inc., d/b/a Trail Exxon
G.G.S.K. 1 d/b/a Northlake Exxon
Lee-Langley Corporation
Robert Lewis, Inc. d/b/a North Stuart Exxon
R. William McGillicuddy
John Pinder
Rylans Enterprises
Williston Center Autocare, Inc.
David Wise

and all similarly situated persons.

Exxon Corporation is now known as Exxon Mobil Corporation. There is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in Exxon Mobil Corporation.

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PETITION FOR CERTIORARI

Petitioner Exxon Corporation ("Exxon") respectfully seeks a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals is reported at 333 F.3d 1248 (App. 67a-92a). The order of the court of appeals denying the petition for rehearing en banc, accompanied by the dissenting opinion of Judges Tjoflat and Birch, is reported at 362 F.3d 739 (App. 1a-66a). The district court's opinion and order determining that the cause of action for breach of contract could proceed on a classwide basis is reported at 188 F.R.D. 667 (App. 172a-211a), and the district court's order and opinion entering final judgment for the class representatives only, denying the motion to enter final judgment for the class, and certifying the case for interlocutory review is reported at 157 F. Supp. 2d 1291 (App. 95a-156a).

STATUTE AND RULE INVOLVED

28 U.S.C. § 1367 and Federal Rule of Civil Procedure 23 are reproduced at App. 246a-254a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 11, 2003. App. 68a. Petitioner timely filed a petition for rehearing and rehearing en banc, which was denied on March 15, 2004. App. 2a. Petitioner filed a motion for extension of time with Justice Anthony M. Kennedy on May 10, 2004. Justice Kennedy granted petitioner an extension of time up to and including July 14, 2004, to file a petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

A textbook of Supreme Court practice could use this case to illustrate many of the "compelling reasons" to grant a petition for certiorari listed in Supreme Court Rule 10. The initial question presented is whether in a class action, federal courts with diversity jurisdiction over the claims of named class representatives also have supplemental jurisdiction, 28 U.S.C. § 1367, over the claims of class members who fail to meet the amount-in-controversy requirement of § 1332. This Court previously granted review to resolve the enduring conflict among the courts of appeals over this question, but the Court divided evenly and was unable to reach a decision. Currently, five courts of appeals hold that § 1367 extends supplemental jurisdiction to unnamed class members who do not satisfy the amount-in-controversy requirement, while three courts of appeals reject this interpretation of § 1367, holding that Congress's contrary intent is clear. This conflict also results in a split concerning the continuing validity of *Zahn* v. *International Paper Co.*, 414 U.S. 291, 301 (1973), which holds that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case."

The question presented here recurs frequently, and the importance of a prompt resolution and a uniform interpretation of § 1367 is universally acknowledged. A significant portion of the federal judiciary necessarily is exercising jurisdiction that it does not have or refusing to exercise jurisdiction that Congress has conferred. And, because the scope of diversity jurisdiction is at stake, courts wrongly exercising supplemental jurisdiction are intruding on a state realm. Finally, because this case arises in the class-action context, the persistent conflict results in forum shopping by plaintiffs seeking the most favorable jurisdiction and in fundamental unfairness to defendants subjected to the inequitable administration of law.

The second question presented also raises issues of broad importance. The basic question is whether a multi-state class lawfully can be certified in a diversity case under Federal Rule of Civil Procedure 23(b)(3) where, as here, the court is required to ignore or distort applicable (and varying) individual state laws in order to create "common" issues of liability that can be litigated on a classwide basis. This case exemplifies a spreading and deeply serious problem in the nation's judicial system: the certification of massive, multi-state classes asserting claims that, if asserted individually, would be governed by differing state laws and would be subject to individual factual inquiries, including individualized defenses to each claim. Such orders not only violate Rule 23, they also run afoul of the basic due process principle that each party – plaintiff and defendant alike – shall have his or her own day in court. Rule 23, to be sure, exists to facilitate the classwide litigation of claims on a representative basis, but only where the claims and defenses truly common to every claimant will predominate in the litigation. Predominance of common issues cannot be manufactured – by, for example, disregarding or altering state laws that demand individualized inquiries – for the purpose of facilitating classwide adjudication.

This point follows directly from the terms and history of Rule 23, but it is a point to which courts appear to be increasingly insensitive, as they seek to force complex economic and social problems into the "efficient" device of all-or-nothing class litigation. Of course, what courts *really* are seeking in many such cases is not litigation, but a judicially-engineered settlement that "fairly resolves" the dispute. But what results is typically not efficient and fair, but instead quick and dirty. Here, Exxon did *not* acquiesce in an unfair settlement driven by the unjust class certification, but saw the case through a trial governed by theories of relief and rules of law invented to make a class action possible. The result was a jury verdict of classwide liability even more

unfair than an artificial classwide settlement would have been. As wrong as the result here may be, it is striking because a trial was actually held. Often, defendants cannot afford the risk Exxon assumed here, and for which it will wrongly pay, unless the Court clarifies the proper meaning and application of Rule 23(b)(3) in diversity cases involving multi-state classes.

STATEMENT OF THE CASE

1. Plaintiffs here represent a class of approximately 10,000 current and former Exxon motor fuel dealers. They allege that in 1982 Exxon initiated a marketing program known as the Discount for Cash ("DFC") program and that in administering that program, Exxon overcharged them for wholesale motor fuel purchases between March 1, 1983 and August 31, 1994. Plaintiffs characterize these overcharges as breaches of Exxon's agreements with its dealers. App. 69a.

Each Exxon dealer operates under a separate contract (called a "Sales Agreement") with Exxon. App. 69a, 223a. Each Sales Agreement contains an open-price term, under which the individual dealer is obligated to pay Exxon's "established dealer price" at the time of delivery. Sales Agreement, art. 4; App. 88a & n.16. There is no national dealer price; instead, Exxon establishes the wholesale price for individual dealer sales by continually evaluating market conditions to estimate the wholesale prices charged by Exxon's competitors in each local market. As a result, dealer prices vary from market to market; and, because they are estimates, they can be below, at, or above the "true" wholesale market price for any given dealer at any given time.

The DFC program was a response to competitive pressure from companies that did not offer credit cards and thus did not incur fees associated with credit card payment. App. 69a. It was intended to encourage Exxon dealers to implement a

price structure that would, in turn, encourage retail customers to use cash rather than a credit card to pay for motor fuel, by charging customers using cash a few cents less than customers using credit cards. *Id.* Under the DFC program, Exxon changed its pricing system so that dealer prices were set in each market by reference to the local wholesale "cash" price (rather than the credit price), charged dealers a 3% processing fee on all credit card sales, and urged (but did not require) dealers to establish a two-tiered retail price structure, offering a discount to customers paying cash. *Id.* No Sales Agreement mentions the DFC marketing program.

2. In May 1991, the dealers filed a class action against Exxon in federal district court; the stated basis for federal court jurisdiction was diversity of citizenship under 28 U.S.C. § 1332. The dealer class alleged that the DFC program created a contractual obligation for Exxon to offset the mandated credit card fees by reducing wholesale gasoline prices "on average" for the class "as a whole" – not for each individual dealer. The class alleged that this contractual obligation was imposed under the dealers' individual Sales Agreements, even though the Sales Agreements do not refer to any such price reduction. The class further asserted that under the DFC program, Exxon reduced the wholesale price by 1.7 cents per gallon for six months, but stopped providing this reduction in March 1983 without informing its dealers. The dealers claimed that by ceasing to reduce wholesale prices to offset the 3% credit card fee, Exxon breached its contractual obligation to the class as a collectivity and, "on average," overcharged the dealers for gasoline during the class period. App. 109a-110a, 161a.

Plaintiffs sought class certification. Exxon opposed the motion on the grounds that the varying circumstances of each dealer's sales – including regional variations in market and pricing conditions – as well as individual dealer reliance on alleged representations, individual damages determinations, and the existence of individualized affirmative defenses,

made certification impermissible under Rule 23(b)(3). The magistrate judge rejected Exxon's arguments, applying a presumption in favor of class certification, App. 238a ("in doubtful cases or when a question exists, the benefit of the doubt should sway in favor of certifying the class"), and stating that "[i]f the liability issue is common to the class, common questions are held to predominate over individual questions," *id.* at 235a (internal quotation marks omitted). The magistrate judge recommended certification of a class of all dealers who were party to a Sales Agreement at any time during the DFC program, *id.* at 238a, and the district court affirmed that recommendation, *id.* at 220a.

Exxon also asserted that the court lacked jurisdiction over class members who did not satisfy the requirements of § 1332. The district court rejected this argument and held that it had jurisdiction over all class members under § 1367. App. 212a-214a.

After certification, the case was tried to a hung jury in September 1999. It was retried in January 2001, resulting in a jury verdict in favor of the dealer class. The jury found that Exxon was *not* "[r]equired to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, offset the 3% credit card recovery fee." App. 161a, 163a. Instead, the jury found that Exxon had a contractual obligation to reduce prices "on average" to the class as a whole. *Id.* at 161a, 162a.

The district court denied Exxon's post-trial motions seeking to overturn the verdict, and awarded pre-judgment interest and compensatory damages. App. 155a-156a. The court later entered final judgment under Rule 54(b) *for the named class representatives* based on a computation of the "on average" damage figure. *Id.* at 93a-94a. The court denied, however, the dealers' motion for entry of a final judgment with respect to the class. The court concluded that it could not enter an aggregate damages award because the jury had not awarded aggregate damages, and therefore that final judgment could

be entered only for the class representatives. *Id.* at 155a. The court established an ad hoc claims process through which Exxon could contest individual class members' claims for compensatory damages. *Id.*

The court also certified the case for interlocutory review under 28 U.S.C. § 1292(b), asking the court of appeals to resolve the following substantial questions: "(1) whether [the court] properly exercised supplemental jurisdiction over class members whose claims did not meet the jurisdictional minimum amount in controversy requirement; and (2) whether an aggregate compensatory and prejudgment interest award could be entered for the class before the claims administration process." App. 68a.

3. The Eleventh Circuit affirmed the district court order. First, it addressed whether the district court had supplemental jurisdiction over the claims of class members who failed to meet the minimum amount-in-controversy requirement of § 1332(a). The court recognized that the issue "has been the subject of considerable debate among our sister circuits, which have split on the issue." App. 71a-72a (citing cases). Relying on the plain language of the supplemental jurisdiction statute, the court held that § 1367 authorizes a district court entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional minimum amount-in-controversy requirement. *Id.* at 72a-74a. In so doing, it joined four Circuits, and disagreed with three others. *Id.* at 71a-72a.

The court next affirmed the district court's refusal to enter an aggregate judgment for the dealers based on the jury verdict. App. 79a. The court acknowledged that "the determination of the amount that each dealer was overcharged during the class period must take place on an individual basis, taking into account the amount of compensatory damages to which each dealer is entitled." *Id.* at 78a. The court found several obstacles to issuance of an aggregated judgment, including (a) the dealers who had opted out of the suit or

failed to submit claims; (b) the dealers whose claims were barred by the Ohio statute of limitations; (c) the awarding of prejudgment interest whose rate varies from state to state; and (d) Exxon's right to set off against the claims of some dealers. *Id.* at 79a. In light of the determinations to be made in the individual claims process, moreover, the court affirmed Exxon's right to participate in the claims process and to raise its claims of entitlement to set-offs. *Id.* at 80a, 83a.

Finally, the court affirmed the certification of the class under Rule 23(b)(3). The court rejected Exxon's arguments that "there were individual issues inherent in each dealer's breach of contract claim and its own affirmative defenses." App. 85a. The court held that because the dealer agreements were "materially similar and Exxon purported to reduce the price of wholesale gas for all dealers," its "duty of good faith was an obligation that it owed to the dealers as a whole." *Id.* Moreover, while the court recognized that there were numerous individualized damages issues that potentially required 10,000 hearings to resolve, the court held that "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Id.* at 86a.

4. Exxon filed a petition for rehearing and rehearing en banc, which the Court denied. Judge Tjoflat, joined by Judge Birch, dissented from the denial of rehearing on the question whether the district court, with jurisdiction under § 1332, had the power to exercise supplemental jurisdiction over unnamed class members who failed to meet the amount-in-controversy requirement for federal diversity jurisdiction.

To recapitulate the dissenting opinion is to state the case for this Court's review of the issue. After providing the relevant background and context, Judge Tjoflat first demonstrates that "the circuit courts of appeals – indeed, the entire federal judiciary – is deeply divided over this issue." App. 9a. He explains that "five federal appellate courts are of the opinion that unnamed plaintiffs may invoke supplemental jurisdiction

in diversity-based class actions without satisfying § 1332's amount-in-controversy requirement, while three courts adhere to the opposite conclusion." *Id.* at 14a. The conflict in the courts of appeals is mirrored in "confusion and disarray" in the results and reasoning of district courts and among commentators. *Id.* at 16a-24a & nn.10-16 (citing extensive authority). He concludes that "[i]f the Supreme Court does not grant certiorari in this case, appellate courts, district courts, commenters, and attorneys will simply continue to talk past each other, deploying an unbelievably wide array of interpretative canons to reach radically divergent conclusions." *Id.* at 24a.

The dissent next argues that the scope and meaning of § 1367 present critically important questions of federal jurisdiction. "Whatever the ultimate merits of the § 1367 issue, the fact remains that a large number of courts – unelected judges who are not democratically accountable – are either abdicating or abusing their authority; maintenance of such a status quo is intolerable." App. 28a. And, Judge Tjoflat points out, the proper interpretation of § 1367 has already affected numerous cases and "hundreds of thousands, if not millions of people, corporations, and other businesses, and promises to continue to do so well into the future," *id.* at 34a. Further, the dissent demonstrates, uniformity is important in this setting, both to prevent plaintiffs from forum shopping and to ensure the fair enforcement of the important right to be heard in federal court. *Id.* at 45a-47a.

Finally, the dissent observes that this Court has already given a significant indication that it considers the issue presented worthy of review, because it previously granted a petition to address the question. App. 49a (citing *Free* v. *Abbott Labs.*, 529 U.S. 333 (2000) (per curiam)). The Court, however, divided evenly and was unable to reach a decision.

REASONS FOR GRANTING THE PETITION

I. THE PETITION PRESENTS AN IMPORTANT, RECURRING QUESTION OF FEDERAL JURISDICTION ON WHICH THE CIRCUITS ARE DEEPLY AND STEADFASTLY DIVIDED.

The first issue presented is whether § 1367 authorizes federal district courts exercising diversity jurisdiction to assert supplemental jurisdiction over unnamed plaintiffs in class actions who fail to satisfy § 1332's amount-in-controversy requirement. Put differently, the issue is whether § 1367 legislatively overrules this Court's decision in *Zahn*, holding that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case." 414 U.S. at 301. This issue is the subject of a broad, established conflict among the courts of appeals on an important, recurring question of federal law that has not been settled by this Court and that has been decided by the court below in a way that arguably conflicts with decisions of this Court. This Court's intervention is necessary to determine the proper scope of federal court jurisdiction and to ensure the uniform, fair administration of justice among the federal courts. Indeed, the Court has previously determined that this issue warrants its attention by granting the petition for certiorari to address it in *Free*, 529 U.S. at 333, and then dividing evenly and failing to resolve the conflict. Today, the conflict is even broader than in 2000 and the Circuits' inconsistent positions have hardened into established law.

A. The Courts Of Appeals Are Deeply Divided.

"No issue facing federal circuit courts of appeals today has generated as deep and abiding a schism as the question of supplemental jurisdiction under § 1367." App. 13a-14a. Five circuits have now held that district courts exercising diversity jurisdiction over a class action may exert supplemental jurisdiction over unnamed class members who do not satisfy

§ 1332's amount-in-controversy requirement. Three circuits have held that such jurisdiction remains precluded. Circuits concluding that § 1367 extends supplemental jurisdiction to the claims of unnamed class members rely almost exclusively on what they perceive to be § 1367's "plain language." See *id.* at 14a-15a; *Rosmer* v. *Pfizer Inc.*, 263 F.3d 110, 117 (4th Cir. 2001); *Gibson* v. *Chrysler Corp.*, 261 F.3d 927, 938 (9th Cir. 2001); *Stromberg Metal Works, Inc.* v. *Press Mech., Inc.*, 77 F.3d 928, 931 (7th Cir. 1996); *Free* v. *Abbott Labs.*, 51 F.3d 524, 528 (5th Cir. 1995). The other courts of appeals determined that the language requires the contrary result or is at least ambiguous, requiring resort to the legislative history which unambiguously demonstrates that Congress did not intend to alter *Zahn*. See *Leonhardt* v. *Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998); *Meritcare Inc.* v. *St. Paul Mercury Ins. Co.*, 166 F.3d 214, 221 (3d Cir. 1999); *Trimble* v. *Asarco, Inc.*, 232 F.3d 946, 961-62 (8th Cir. 2000). As these citations reveal, the conflict that existed when this Court agreed to hear *Free* has only deepened.

In addition, the decision below (like those of four other circuits) is in substantial tension with *Zahn*. The court below held that Congress legislatively overruled *Zahn*, though the statute does not address diversity-based class actions and the legislative history explicitly declares that Congress intended to preserve *Zahn*. See *infra* at 18. The question whether a decision of this Court has been overruled *sub silentio* now divides the lower courts and is worthy of this Court's attention.

Finally, the endurance and depth of the circuit conflict is reflected in the magnitude and varying perspectives of the legal literature. The conflict is recognized in the three most prominent treatises of federal civil procedure and federal courts jurisdiction, see 5 James Wm. Moore, *Moore's Federal Practice* § 23.07[3][c], at 23-47 (3d ed. 2003); Wright & Miller, *Federal Practice and Procedure* 175 (2003 Supp.); Richard H. Fallon, et al., *Hart & Weschler's The Federal*

Courts and the Federal System 926-930, 1490-93 (5th ed. 2003). There is no current prospect of a uniform interpretation of § 1367 without this Court's intervention.

B. The Issue Is Recurring And Important.

There are thousands of class actions pending (as of 2003, 4,977), and numerous class actions are filed in federal district courts every year. In 2003, 266 of the new class actions filed were based on diversity jurisdiction.[1] There can be no doubt that the application of § 1367 to unnamed class members who do not satisfy the amount-in-controversy requirement will recur. Indeed, the number of cases addressing the issue since the passage of the supplemental jurisdiction statute in 1991 proves the point. And, as the dissent below persuasively demonstrates, the number of people affected is in the "hundreds of thousands," and vast amounts of money are at stake. See App. 35a-36a, 38a-39a.

The importance of the issue is similarly beyond dispute. A persistent conflict about the scope of the jurisdiction of the federal courts is intolerable for several reasons. First, federal courts are courts of limited jurisdiction, and these limits, "whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978). In petitioner's view, federal courts are exercising jurisdiction that they do not have in five federal circuits; in respondents' view, federal courts are wrongfully refusing to exercise jurisdiction they have in three federal circuits. From either viewpoint, a congressional delineation of federal court jurisdiction is being violated in a substantial portion of the federal system. See App. 28a ("[w]hatever the ultimate merits of the § 1367 issue,

[1] The annual reports on the Judicial Business of the United States Court produced by the Judicial Conference contain statistics on class actions. They are available at http://www.uscourts.gov/judbususc/judbus.html (last visited July 14, 2004). For the cited statistics, see Tables X-4 and X-5 of the 2003 Report.

the fact remains that a large number of courts – unelected judges who are not democratically accountable – are either abdicating or abusing their authority"). The clear demarcation of the federal courts' jurisdictional boundaries is at stake in this case.

Second, ascertaining the proper scope of supplemental federal court jurisdiction affects both the separation of powers and our federalism. Jurisdictional limitations ensure that the federal courts do not upset the balance of power among the branches of the federal government by "keep[ing] the federal courts within the bounds the Constitution and Congress have prescribed." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Moreover, in the diversity-jurisdiction setting, federal courts are empowered to adjudicate state law claims – *viz.*, claims that presumptively should be left to state tribunals. See *Speiser* v. *Randall*, 357 U.S. 513, 523 n.7 (1958) (reciting the "basic constitutional principle that the construction of state laws in the exclusive responsibility of the state courts"). In petitioner's view, federal courts in five federal circuits are adjudicating disputes within the exclusive jurisdiction of state courts without any congressional authorization, while in respondents' view, federal courts in three federal circuits are wrongfully "denying [unnamed class members] their right to a federal forum" conferred by Congress in § 1367. App. 30a. The issue presented, accordingly, strikes at the core of our constitutional structure in two important respects.

Third, the ubiquity and importance of § 1367 make conflict and uncertainty in its application intolerable. A lack of uniformity in the interpretation and application of § 1367 is fundamentally unfair to litigants in diversity-based class cases. Neither plaintiffs nor defendants should be denied a federal forum (if that is their preference and right), depending upon whether a nationwide class action is brought in Philadelphia, Denver, New Orleans, or Chicago. The current lack of uniformity simply encourages unseemly forum

shopping by plaintiffs. This problem is particularly acute in the class action setting because plaintiffs often have limitless options as to where to bring the lawsuit. See App. 46a ("plaintiffs' attorneys can essentially cherry-pick . . . a named plaintiff and decide for themselves the district court and circuit in which to file suit"). Because this Court's diversity jurisprudence seeks to "discourage[] forum-shopping and avoid[] inequitable administration of the laws," review to ensure uniformity is uniquely appropriate here. *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965).[2]

For all of these reasons, this recurring and important issue merits this Court's immediate attention and resolution.

C. The Decision Below Is Wrong.

The decision below is wrong in ways that do violence to Congress's intent, disregard a decision of this Court, and substantially expand the caseload of the federal judiciary.

The panel relied solely on the plain language of the statute in concluding that district courts with diversity jurisdiction

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[2] The Eleventh Circuit's decision logically entails interpreting § 1367 to authorize federal courts to exercise supplemental jurisdiction over the claims of named parties who do not meet the amount-in-controversy requirement, if a single plaintiff satisfies § 1332. *See* App. 43a (explaining that the Eleventh Circuit's interpretation "'could lead to a finding of federal jurisdiction for an entire multi-party action where diversity only existed between two parties'") (citation omitted). This, in turn, would effect a dramatic expansion in the right of removal. *Id.* ("[u]nder the panel's interpretation of § 1367, a significant number of cases that would not have been removable to federal court, due to the involvement of parties who did not satisfy § 1332's requirements, may now be removed"). The reverberations of the conflict in interpreting § 1367 will echo through federal-jurisdiction jurisprudence, exacerbating the fundamental unfairness already present in the lack of uniformity. *See Ortega* v. *Star-Kist Foods, Inc.*, 370 F.3d 124, 132 (1st Cir. 2004) ("[b]ecause the same statutory language applies in both contexts, some courts have lumped the two together for purposes of § 1367") (citing *Meritcare*, 166 F.3d at 218; *Stromberg*, 77 F.3d at 931).

may exercise supplemental jurisdiction over unnamed parties who do not satisfy the amount-in-controversy requirement. The language of the statute is far from plain. In pertinent part, § 1367(a) provides that:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

This language is ambiguous with respect to whether district courts have supplemental jurisdiction over the claims of unnamed class members in diversity-based class actions. Most notably, as the dissent below explains (App. 57a-58a), § 1367 invokes the concepts of a district court's "original jurisdiction" over a "civil action." Under established law, the joinder or aggregation of parties and claims has different implications for a court's "original jurisdiction" in federal-question and diversity "civil actions." Under the federal-question statute, a court has original jurisdiction of an action that presents a federal question, and the joinder or aggregation of parties and claims does not affect that "original jurisdiction." In contrast, under the diversity statute, the presence of additional parties or claims can determine whether the court has "original jurisdiction" – *e.g.*, because the parties are not completely diverse or because the claims do not satisfy the amount-in-controversy requirement. A court does not have "original jurisdiction" under § 1332 over a class action filed on behalf of unnamed class members who do not meet the amount-in-controversy requirement. See *Zahn*, 414 U.S. at 301. The prerequisite for exercising supplemental jurisdiction is therefore unsatisfied.

The traditional response to this argument – that the court has jurisdiction over the civil action brought by the named class members who satisfy § 1332 and can therefore exercise supplemental jurisdiction over the claims of unnamed class members who do not — rests on flawed premises. It treats the phrase "civil action" as if it were the word "claim" and it treats a class action as if it were simply a joinder or consolidation of individual claims. In fact, Congress did not say that courts may exercise supplemental jurisdiction whenever any single claim in an action would support original jurisdiction, as the panel would have it. In addition, a class action is a representative suit. See Fed. R. Civ. P. 23; *Hansberry* v. *Lee*, 311 U.S. 32 (1940) (characterizing the class action as a "representative suit"). A federal court does not have original jurisdiction over a class or representative action in which unnamed class members do not satisfy the amount-in-controversy requirement, see *Zahn*; and the court must either alter the class definition to exclude members who do not satisfy the requirement or deny certification to the class (as was done in *Zahn*). Put differently, once the court obtains "original jurisdiction" over a diversity action by dismissing from the suit all parties named and unnamed who do not satisfy the amount-in-controversy requirement, what remains is either (a) a class which, by definition, non-compliant plaintiffs cannot join, or (b) not a class. The supplemental jurisdiction statute authorizes the addition of claims to a civil action – not the creation of a class over which the court lacks original jurisdiction.[3]

Those who argue that § 1367 cannot possibly be interpreted to require a federal court to have "original jurisdiction" over a

[3] In addition, because a class action is a representative action litigated by class representatives "on behalf of all," the claims of unnamed class members are not "other claims" within the meaning of § 1367; indeed, a class action is appropriate only when "joinder of all members is impracticable," Fed. R. Civ. P. 23(a), making clear that the claims of unnamed class members are not claims that are joined or added.

diversity-based class action in order to exercise supplemental jurisdiction over unnamed class members also claim that it renders the statute meaningless. They claim that under such an interpretation, § 1367 would say that a court may only exercise supplemental jurisdiction with respect to claims over which it already has jurisdiction. That is not true. Section 1367(a) allows a court with "original" federal question jurisdiction to exercise supplemental jurisdiction over the federal plaintiff's state law claims and any non-federal counterclaims, cross-claims, and claims by and against intervenors, etc. (subject to § 1367(b)). And, the statute authorizes courts with diversity jurisdiction to exercise supplemental jurisdiction over counterclaims by defendants, cross-claims among plaintiffs, and claims by and against intervenors, etc., (again subject to § 1367(b)).

The plain language argument of the panel is called into question not only by the above interpretation, but also by the improbable consequences of adopting the panel position. Congress has an established policy of restricting diversity jurisdiction, not expanding it, usually by raising the amount-in-controversy bar; and this Court construes diversity jurisdiction narrowly, see *Snyder* v. *Harris*, 394 U.S. 332, 340-41 (1969). It is implausible to think that § 1367 overturned *Zahn* (and *Clark*, as well, if all multiparty litigation in diversity cases is affected by § 1367), and substantially expanded diversity jurisdiction based on this ambiguous statutory language.

Finally, the legislative history of § 1367 makes absolutely clear that Congress did not intend to overrule *Zahn*. The House Judiciary Committee report states that the bill was intended to "essentially restore the pre-*Finley* understandings of the authorization for and limits on . . . supplemental jurisdiction." H.R. Rep. No. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874. With respect to class actions, the bill states:

> The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*. [*Id.* at 29, *reprinted in* 1990 U.S.C.C.A.N at 6875.]

Critically, note 17 cites *Zahn*. See *id.* at 29 n.17, *reprinted in* 1990 U.S.C.C.A.N. at 6875 n.17. The House report was adopted by the Senate Judiciary Committee. See 136 Cong. Rec. S17580-81 (daily ed. Oct. 27, 1990); *id.* at S17578 (statement by bill sponsor Sen. Grassley) (the bill does not "represent major changes in the law"); *id.* at H13313 (statement by bill sponsor Rep. Kastenmeier) (the bill is "noncontroversial").

The legislative history contains no hint of any contrary intent – and certainly the opposite of any intent to expand the established bounds of diversity jurisdiction. See *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613-14 (1991) ("If this amendment had been intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect to find some expression of that intent in the legislative history"); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes").

This Court should grant the petition to resolve the broad and fixed conflict among the courts of appeals about the recurring and important question of the proper scope of federal courts' diversity-based jurisdiction under § 1367.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE MEANING AND PROPER APPLICATION OF RULE 23(B)(3).

Rule 23 is a procedural device of immense importance to the fair and efficient administration of justice in the United States, designed as "'an exception to the usual rule that

litigation is conducted by and on behalf of the individual named parties only,'" *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 155 (1982). But precisely because the mass adjudication of claims is such a unique procedure, this Court has emphasized that courts must engage in a "rigorous analysis" of whether a given case satisfies the important prerequisites for invocation of the class action device. *Id.* at 161; see *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997) (Rule "'invites a close look at the case before it is accepted as a class action'"). The stakes are high because the costs of the Rule's erroneous application are manifold and severe. On the one hand, absent class members are deprived of their own "day in court," and their rights may be conclusively determined without a fair opportunity for them to litigate and obtain their own remedies. See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 808-11 (1985); *Hansberry* v. *Lee*, 311 U.S. at 42-43. On the other hand, a defendant forced to defend against claims *en masse* that are not truly common may be denied his due process right to present a full defense against each claim. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982). Perhaps even more important, the "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

Despite the unquestioned significance of the class action procedural tool in modern civil litigation – and the undeniable importance of clarity in the standards governing invocation of the device – there is widespread disagreement and uncertainty in the courts over the proper application of the broad generalities set forth in Rule 23. There is little confusion about the application of four preliminary requirements for class certification of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation). In addition, the courts agree that Rule 23(b)(3)'s requirement that common

issues of law and fact "predominate" over issues affecting class members individually is intended to "test[] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. And, the courts further agree that Rule 23(b)(3)'s instruction that class litigation be "superior" to other methods for fairly and efficiently resolving the controversy is intended to address whether the class action is manageable. *Id.* at 624. At that point, all agreement ends, for the courts are hopelessly divided about the meaning and proper application of the Rule 23(b)(3) criteria.[4]

This case illustrates both the uncertainty about Rule 23(b)(3) and the deleterious consequences of its misapplication. First, the decision deepens a square and acknowledged circuit conflict over the question whether Rule 23 allows class certification when the plaintiffs must prove each class member's individual reliance to establish equitable tolling of a statute of limitations. Second, the decision exemplifies a growing tendency among courts to disregard federal statutes – and key decisions of this Court construing those statutes – requiring courts to apply the federal procedural rules, including Rule 23, so as not to derogate either the substantive rights of the parties or the substantive law of the states from which their rights arise. Finally, uncertainty over Rule 23's requirements inevitably results in frequent and recurring errors, which have practical consequences of the utmost severity, given the inherent nature of the class action device as a liability-magnifier.

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[4] *See* Priya Laroia, *Comment: Individualized Affirmative Defenses Bar Class Certification Per Se*, 2003 U. Chi. Legal F. 805, 807 ("Courts often have muddled the distinctions between the various requirements for certification under Rule 23. Although the Supreme Court has issued decisions indicating the appropriate scope of a certification inquiry, these decisions sometimes have added to courts' questions about the appropriate analysis at the certification stage") (footnotes omitted).

A. The Decision Below Directly Conflicts With Decisions of Other Circuits.

The decision below affirms the certification of a class in this case despite the fact that, *inter alia*, the validity of each class member's individual claim turns on whether he or she personally acted in reliance on statements by Exxon regarding the existence of the DFC program. The issue arises because Exxon has statute of limitations defenses against virtually every class member's claim – defenses that are otherwise indisputably valid, but for the plaintiffs' assertion that Exxon "fraudulently concealed" its termination of the DFC program by stating during dealer meetings that the program was still in existence. Had Exxon not made those statements, plaintiffs contend, each of the class members would have filed suit earlier, within the limitations period applicable in each of their states. The district court held that the need to prove each dealer's reliance would not preclude class certification, App. 187a-189a, but expressly acknowledged that "some courts have reached contrary determinations," *id.* at 189a n.19.

The district court was right in one respect: the courts, including the circuits, are openly divided over the question whether a class may be certified when plaintiffs assert reliance-based equitable tolling and fraudulent concealment theories to defeat a statute of limitations defense. As the Third Circuit has described the conflict:

> The cumulative experience of the judiciary has not been uniform in this regard. Some courts have regarded the issue of concealment to predominate, and have held that class certification is permissible, even though some individual questions are present. Other courts have considered individual questions to be too pervasive to permit it to be handled as a class matter. [*Winoff Indus., Inc.* v. *Stone Container Corp. (In re Linerboard Anti-trust Litig.)*, 305 F.3d 145, 161 (3d Cir. 2002), *cert. denied*, 538 U.S. 977 (2003).]

On one side of the conflict at the Circuit level are the Fourth and Fifth Circuits, which reject class certification where fraudulent concealment and reliance are at issue. The Fifth Circuit's rule is the most categorical: A "fraud class action cannot be certified when individual reliance will be an issue." *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). Applying that rule, the Fifth Circuit has twice reversed certifications of classes asserting fraudulent concealment against statute of limitations defenses. See *McManus* v. *Fleetwood Enters., Inc.*, 320 F.3d 545 (5th Cir. 2003); *Sandwich Chef of Tex., Inc.* v. *Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003). The Fourth Circuit also has held that the individual reliance element necessary to prove fraudulent concealment for purposes of tolling a limitations period cannot be proved on a classwide basis. See *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998).[5]

In conflict with these decisions, the First and Third Circuits – like the Eleventh Circuit in this case – have held that a class asserting fraudulent concealment may be certified despite individual reliance issues. In *Waste Management Holdings, Inc.* v. *Mowbray*, 208 F.3d 288 (1st Cir. 2000), the First Circuit upheld the certification of a class in the face of individualized limitations issues differentiating the class members' claims. In so doing, the court expressly "reject[ed]" the Fourth Circuit's contrary decision in *Broussard*. 208 F.3d at 296 n.4. And, as set forth above, in *Linerboard*, the Third Circuit recognized the conflict between

[5] Relatedly, the Sixth Circuit has held that estoppel claims – *e.g.*, claims that the defendant should be estopped from asserting a limitations defense because of fraudulent concealment – "are typically inappropriate for class treatment" because they "require[] proof of what statements were made to a particular person, how the person interpreted those statements, and whether the person justifiably relied on the statements to his detriment." *Sprague* v. *General Motors Corp*, 133 F.3d 388, 398 (6th Cir. 1998) (en banc) (reversing class certification).

Broussard and *Waste Management*. 305 F.3d at 162. Siding with the First Circuit, the Third Circuit affirmed class certification even while recognizing that "certain determinations involving the fraudulent concealment defense to the statute of limitations will require individualized proof, which might vary among the assorted [class members]." *Id.*

B. The Decision Below Is In Substantial Tension With Decisions Of This Court Interpreting The Rules Of Decision Act.

The courts below "solved" the problem of classwide proof presented by plaintiffs' equitable tolling claims by eliminating it. As elaborated below, they adopted a legal rule that simply absolved each individual class member from having to prove his or her actual reliance on Exxon's statements. That ruling is but one example of a more fundamental problem with the certification order in this case, which, at its core, allowed the dealers to pursue *as a class* a pricing "overcharge" claim that admittedly had *nothing to do with the prices charged to any individual dealer*. Put differently, rather than requiring individual dealers to show that each personally paid more than Exxon's "established dealer price" for gasoline – which obviously would have precluded classwide treatment of their claims – the dealers were allowed to transform their individual claims into a special "classwide breach" claim, under which individual prices and contracts were deemed irrelevant. Exxon, however, indisputably does *not* set dealer prices on any nationwide or classwide basis, but instead employs a complicated system of evaluating wholesale market prices, which takes into account regional and local market conditions on a near-daily basis. Nonetheless, because Exxon was forced to defend against plaintiffs' breach claim on a classwide basis, it was precluded even from attempting to show that individual dealers, or dealers in certain regions, did *not* "overpay" for gasoline during the class period.

To accomplish classwide litigation of plaintiffs' breach claim, the courts below disregarded or altered a number of the different states' laws that otherwise would have applied in breach of contract actions brought by individual class members. In short, the courts adopted an approach to class certification that is increasingly common among the nation's courts: driven by a perceived "need to preserve a class action at all costs," the courts "distort[ed] the underlying theory of substantive liability beyond recognition." Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. Chi. Legal F. 475, 509.

That approach violates the courts' fundamental duty under *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), to apply substantive state law in a diversity action, as well as their duty under *Amchem*, to apply Rule 23 so as *not* to "'abridge, enlarge or modify any substantive right,'" 521 U.S. at 613. And because the decision below creates the mirage of predominance under Rule 23 by rewriting or ignoring state laws as needed to overcome factual and legal variations among class members' claims, it "rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design." *Id.* at 625.

1. The first respect in which the class certification order here violates *Erie* and *Amchem* is by adopting, for purposes of this class litigation, a special rule of *presumed reliance* for the class members' equitable tolling claims.

Plaintiffs based their fraudulent concealment argument on an Exxon official's statements at annual dealer meetings that Exxon was still providing the DFC offset. Although *no* named plaintiff or class member testified that he or she heard and relied on Exxon's statements, the jury was permitted to infer that *every* class member relied on the statements because "the minutes of each annual meeting were sent to each dealer representative with the intention that they then be mailed to each individual dealer." App. 90a. But no plaintiff or class member testified that he or she received the minutes or read

them. Most important, not one dealer testified that he or she relied on the minutes in deciding whether or not to bring suit. That record would be entirely insufficient in jurisdictions where proof of *actual* reliance is required for equitable tolling. See *id.* at 185a-186a (citing jurisdictions requiring actual reliance).[6] The courts below circumvented that problem for purposes of this class action by adopting a special rule allowing the jury to *presume* that all class members relied on statements reported in the minutes.

Although a handful of states have adopted a rule that reliance may be presumed in fraud class actions,[7] the vast majority require every plaintiff to prove – even in a class action – that he or she personally heard and relied upon the asserted misrepresentation.[8] Plaintiffs did not and could not offer such individualized proof here. The Eleventh Circuit simply excused them from that requirement. That holding

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[6] Where actual reliance is required, a plaintiff can seek relief from a fraudulent misrepresentation "only if he in fact relies upon the misrepresentation in acting or refraining from action." *Restatement (Second) of Torts* § 537 cmt. a (1981); *see Coffin* v. *Dodge*, 76 A.2d 541, 543 (Me. 1950) ("[a] false statement, that had no influence on the decision of the party complaining, furnishes no ground for relief"). Thus "actual receipt and consideration of any misstatement remains central to the case of any plaintiff seeking to prove that he or she was deceived by the misstatement." *Kaufman* v. *i-Stat Corp.*, 754 A.2d 1188, 1195 (N.J. 2000); *accord Mirkin* v. *Wasserman*, 858 P.2d 568, 584 (Cal. 1993); *Reich* v. *Mitrani Plasterers Co.*, 701 N.Y.S.2d 368, 369 (App. Div. 2000); *Schaaf* v. *Highfield*, 896 P.2d 665, 672 (Wash. 1995) (en banc).

[7] *E.g.*, *Dix* v. *American Bankers Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987); *Cope* v. *Metropolitan Life Ins. Co.*, 696 N.E.2d 1001, 1008 (Ohio 1998).

[8] *E.g.*, *Mirkin* v. *Wasserman*, 858 P.2d at 574; *In re Synergen, Inc. Secs. Litig.*, 154 F.R.D. 265, 267 (D. Colo. 1994) (Colorado law); *Gaffin* v. *Teledyne, Inc.*, 611 A.2d 467, 474 (Del. 1992); *Stevens* v. *Thomas*, 361 S.E.2d 800, 804 (Ga. 1987); *Hazelhurst* v. *Brita Prods. Co.*, 744 N.Y.S.2d 31, 33 (App. Div. 2002); *McManus* v. *Fleetwood Enters., Inc.*, 320 F.3d 545, 549 (5th Cir. 2003) (Texas law).

impermissibly overrides state law and, by eliminating a key element of proof, enlarges class members' substantive rights, while diminishing Exxon's.

2. The class certification order here also altered Exxon's substantive rights by depriving it of a jury trial on all class members' damages claims. The courts below agreed that the approximately 10,000 class members in this case state separate and distinct claims for damages, and that "individualized proof of [each member's damages] claims would be necessary," App. 78a. The district court purported to resolve the manageability problem presented by these individualized damages claims by adopting an approach taken by the Second Circuit in *Wal-Mart Stores, Inc.* v. *Visa U.S.A. Inc. (In re Visa Check/Mastermoney Antitrust Litigation)*, 280 F.3d 124 (2d Cir. 2001), and rejected by the Fifth Circuit in *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998): It severed the damages claims from the liability determination and left them for resolution in an "ad hoc claims process." App. 70a.[9] Under this procedure, damages will be determined not by a jury, but by a private, appointed claims administrator. This is a patent violation of Exxon's Seventh Amendment rights. See *Feltner* v. *Columbia Pictures Tel., Inc.*, 523 U.S. 340, 353 (1998); see also *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998) ("the applicability of the Seventh Amendment is not altered simply because the case is a Rule 23(b)(3) class action").

3. The courts below also altered substantive law to avoid variations in state law regarding what constitutes the "good faith" required in the setting of prices under an "open price" contract term. U.C.C. § 2-305(2). According to the U.C.C.'s official comment, "in the *normal case* a 'posted price' . . .

[9] The certification order here thus deepens the conflict between *Visa* and *Allison* over the propriety of Rule 23(b)(3) class certification when thousands of individualized damages determinations will remain necessary despite class certification.

'price in effect,' 'market price,' or the like satisfies the good faith requirement." *Id.* § 2-305(2) cmt. 3 (emphasis added).

Decisions interpreting U.C.C. § 2-305(2) as adopted by the states have not reached a uniform conclusion as to the proper measure of a seller's good faith. Cf. *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (R.B. Ginsburg, J.) ("'The Uniform Commercial Code is not uniform.'") (quoting J. White & R. Summers, *Uniform Commercial Code* 7 (2d ed. 1980)). Some courts hold that a case is not a "normal case" whenever the seller acted in subjective bad faith.[10] The majority view, in contrast, is that the seller satisfies U.C.C. § 2-305(2)'s "good faith" pricing requirement so long as the price charged was not "commercially unreasonable" in an objective sense – *i.e.*, it did not reflect price discrimination or was not substantially different from competitors' pricing.[11] The courts in this case, however, followed neither rule, but instead swept state law to one side, and instructed the jury to apply the *dictionary definition* of the word "normal" in determining whether Exxon was entitled to a presumption of good faith under § 2-305(2). App. 88a n.16. No state's law

[10] *See, e.g., Mathis* v. *Exxon Corp.*, 302 F.3d 448, 455-57 (5th Cir. 2002) ("[a]ny lack of subjective, honesty-in-fact good faith is abnormal"). The Texas Supreme Court is evaluating whether *Mathis* properly predicted Texas law. *See Shell Oil Co.* v. *HRN, Inc.*, No. 03-0555, 2003 Tex. LEXIS 566 (Dec. 19, 2003) (granting petition for review).

[11] *See, e.g., Tom-Lin Enters. Inc.* v. *Sunoco, Inc. (R&M)*, 349 F.3d 277, 281-82 (6th Cir. 2003) (contrasting Ohio law with Texas law as determined in *Mathis*); *Havird Oil Co.* v. *Marathon Oil Co.*, 149 F.3d 283, 290-91 (4th Cir. 1998) (South Carolina law); *Exxon Corp.* v. *Superior Court*, 60 Cal. Rptr. 2d 195, 204-05 (Cal. Ct. App. 1997); *Schwartz* v. *Sun Co (R&M).*, 276 F.3d 900, 905 (6th Cir. 2002) (Michigan law); *Richard Short Oil Co.* v. *Texaco, Inc.*, 799 F.2d 415, 422 (8th Cir. 1986) (Arkansas law); *Wayman* v. *Amoco Oil Co.*, 923 F. Supp. 1322, 1347, 1349 (D. Kan. 1996) (Kansas law).

has defined the legal term of art "normal case" by reference to a lay dictionary.[12]

C. The Issue Is Recurring And Important.

"The class action represents, without question, one of the most ubiquitous topics in modern civil law. It is only a small exaggeration to say that virtually every major innovation in liability, if brought about by litigation, will either be created by or reflected in the class action." Epstein, *supra*, at 475. Although more than 3000 class actions are filed in federal district courts every year,[13] this Court has not addressed Rule 23(b)(3) since 1996. The Court's guidance is sorely needed. Although Rule 23 issues frequently recur, the lower courts have failed to develop clear principles governing application of the Rule. See *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d

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[12] The courts below also disregarded state laws governing construction of an agreement, signed by more than 5,000 members of the class, unambiguously releasing Exxon from all claims, known and unknown, existing at the time of the release. *See* App. 90a n.18. The courts allowed those dealers to remain members of the class, saying that "the releases would be voidable if the jury found that Exxon breached its duty of good faith and fraudulently concealed its breach." *Id.* That holding does not reflect the law of *any* state governing the dealers' claims. *See* 13 Sarah H. Jenkins, *Corbin on Contracts* § 67.9 (rev. ed. 2003) (a release is voidable if the defendant committed fraud *in inducing the plaintiff to sign the release*). Concealing an underlying breach-of-conduct claim is not the same as fraudulently inducing the release of unknown claims; the latter requires a distinct, affirmative act of fraud, duping the plaintiff into releasing his claims. *See Ingram Corp.* v. *J. Ray McDermott & Co.*, 698 F.2d 1295, 1314 (5th Cir. 1983); *Pioneer Res., LLC* v. *D.R. Johnson Lumber Co.*, 68 P.3d 233, 243 (Or. Ct. App. 1993); *Mazzoni Farms, Inc.* v. *E.I. DuPont DeNemours & Co.*, 761 So.2d 306, 316 (2000); *Dresden* v. *Detroit Macomb Hosp. Corp.*, 553 N.W.2d 387 (Mich. Ct App. 1996). Again, the court altered substantive law to avoid individual inquiries and create artificial predominance under Rule 23(b)(3).

[13] The annual reports on the Judicial Business of the United States Court produced by the Judicial Conference contain statistics on class actions. They are available at http://www.uscourts.gov/judbususc/judbus.html (last visited July 14, 2004).

832, 835 (7th Cir. 1999) (because "a large proportion of class actions settle . . . , fundamental issues about class actions are poorly developed"). This case provides an ideal opportunity for the Court to clarify the proper application of Rule 23.

Such clarity is important because invocation of the class action device implicates serious due process and federalism concerns, as this case demonstrates. Due process demands that plaintiff and defendant alike be afforded a fair opportunity to litigate all of his or her claims and defenses. See *supra* at 19-20. But where the courts alter the substantive law that applies to class members' individual claims to facilitate a class action, "the ability of the defendant to mount an effective defense on liability in each individual case may be effectively compromised in order to allow the class action proceed as such." Epstein, *supra*, at 512-13; see *id.* at 513 ("In principle, it looks as though a systematic inability to present relevant evidence against a claim counts as a denial of the right to a full and fair trial, and thus brings into question whether the class action model as applied comports with the requirements of procedural due process"). That is precisely what happened here. The courts altered substantive law to eliminate material differences among the class members' individual claims, denying Exxon its right to present a full defense of each claim. And, as this case shows, the consequences of that denial can be magnified exponentially – the defendant unfairly loses not a single claim, but *all* claims when they are shoehorned into a single multi-state class.

This case also shows that misuse of Rule 23 in diversity cases infringes the rights of states, as well as the rights of litigants. The fundamental premise of our federalist structure is that the states are free to reach *differing* policy judgments about whether and how to regulate conduct that occurs within their own borders. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 123 S. Ct. 1513, 1523 (2003). Congress may choose to impose a nationwide legislative solution to a nationwide problem; but when Congress has not done so, the

policy decisions of individual states constitute the law. Properly administered, Rule 23 ensures that federal courts certify multi-state classes in diversity cases only when the applicable state laws are materially indistinguishable. Courts may not override and homogenize state law in a quest to certify a multi-state class:

> Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court. Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected. [*In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020-21 (7th Cir. 2002) (citations omitted), *cert. denied*, 537 U.S. 1005 (2003).]

The courts in this case disregarded that basic principle. Other courts are doing the same. This Court should grant review and reassert the primacy of state and individual rights in the application of Rule 23.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

July 14, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

Nos. 01-15575, 01-16244

ALLAPATTAH SERVICES, INCORPORATED, a Florida corporation, ROBERT LEWIS, INC., a Florida corporation, d.b.a. TRIAL EXXON, G.G.S.K.1, INC., a Florida corporation, d.b.a. NORTH STUART EXXON, G.G.S.K., INC., *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

ROY PAGE, GLEBE ROAD EXXON, INCORPORATED,

Plaintiffs,

v.

EXXON CORPORATION, a New Jersey corporation,

Defendant-Appellant, Cross-Appellee.

ALLAPATTAH SERVICES, INCORPORATED, a Florida corporation, ROBERT LEWIS, INC., a Florida corporation, d.b.a. NORTHLAKE EXXON, d.b.a. TRIAL EXXON, G.G.S.K.1, INC., a Florida corporation, d.b.a. NORTH STUART EXXON, G.G.S.K., INC., *et al.*,

Plaintiffs-Appellees,

ROY PAGE, *et al.*,

Plaintiffs,

v.

EXXON CORPORATION, a New Jersey corporation,

Defendant-Appellant.

March 15, 2004

ON PETITION FOR REHEARING EN BANC

Before EDMONDSON, *Chief Judge*, and TJOFLAT, BIRCH, BLACK, CARNES, BARKETT and WILSON, *Circuit Judges*.*

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

TJOFLAT, Circuit Judge, dissenting from the Denial of Rehearing En Banc, in which BIRCH, Circuit Judge, joins:

I dissent from this court's decision to let the panel's ruling stand because I disagree with the panel's interpretation of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367.[1]

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* Judges Anderson, Dubina, Hull and Marcus, having recused themselves, did not participate.

Judge William H. Pryor Jr. became a member of the court on February 20, 2004, and did not participate in the en banc poll.

[1] The federal supplemental jurisdiction statute provides, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367.

This law does not empower federal courts to exercise supplemental jurisdiction over the claims of unnamed class members in diversity-based class actions who fail to satisfy the amount-in-controversy requirement of the federal diversity statute, 28 U.S.C. § 1332.[2] The Supreme Court's holding

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[2] The federal diversity statute provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) Citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), requiring each unnamed class member in a diversity-based class action to meet § 1332's amount-in-controversy requirement in order to invoke a federal court's jurisdiction, remains good law.[3] The panel's opinion in this case will have wide-ranging ramifications on a variety of other areas of the law and lead to massive practical problems. *See infra* Subsections II.C.3, II.C.8.

Regardless of the underlying merits of this dispute, however, this issue is one where careful judicial consideration should not end with a three-judge panel, or even an en banc sitting of a circuit court of appeals, but with the Supreme Court of the United States. In light of its own criteria for granting certiorari, the Court should issue an authoritative determination as to the proper interpretation of § 1367.

I will readily admit that, upon initially considering this subject, one's eyes might glaze over with bored indifference, because it might seem like nothing more than an esoteric point of civil procedure of little interest or practical import to the majority of the nation. Indeed, most Americans have probably never heard of supplemental jurisdiction, and many students have probably graduated law school without having pondered the implications of § 1367's enigmatic language. Upon further reflection, however, it becomes readily apparent that this seemingly obtuse issue raises fundamental questions concerning constitutional law, statutory interpretation, and the integrity of the judicial system that merit the attention and admittedly limited resources of the Supreme Court. *See*

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28 U.S.C. § 1332(a). I refer to the portion of this statute requiring that the "matter in controversy exceed[ ] the sum or value of $75,000" as § 1332's "amount-in-controversy requirement."

[3] To enhance the readability of this opinion, when I refer to "unnamed plaintiffs," it should be understood as referring to "unnamed plaintiffs in diversity-based class actions who fail to satisfy the minimum amount-in-controversy requirement of § 1332."

generally Thomas E. Baker, *Why We Call the Supreme Court "Supreme": A Case Study on the Importance of Settling the National Law*, 4 *Green Bag 2d* 129 (2001) (arguing that the Supreme Court has a responsibility to resolve the supplemental jurisdiction question).

I. A Brief Introduction to the Supplemental Jurisdiction Controversy

In general, district courts may not entertain a particular type of claim unless Congress has expressly granted them jurisdiction to hear it. *Keene Corp. v. United States*, 508 U.S. 200, 207, 113 S.Ct. 2035, 2040, 124 L.Ed.2d 118 ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts."). Over the years, however, the Supreme Court has created certain exceptions to this general rule. For example, 28 U.S.C. § 1331 permits district courts to hear cases brought under federal statutes ("federal question" cases). In 1966, the Court held that a district court hearing a federal question case may exercise "pendent jurisdiction" over state-law claims brought by the same plaintiff against the same defendant as long as they arise from the same "common nucleus of operative facts." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966) (establishing the modern test for pendent jurisdiction); *see also Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978) (holding that where a plaintiff brings federal-law claims against a defendant, the plaintiff may not pursue state-law claims against a third-party defendant interpled by the original defendant, even if such claims arise from the same transaction or event that gave rise to the underlying federal claims against the original defendant).

Similarly, the Supreme Court has held that a district court may exercise "ancillary jurisdiction" over "claims by a defending party haled into court against his will [against the plaintiff or third parties], or by another person whose rights

might be irretrievably lost unless he could assert them in an ongoing action in a federal court." *Id.* at 376, 98 S.Ct. at 2404.

The Supreme Court has never expressly tied either of these doctrines—"pendent jurisdiction" and "ancillary jurisdiction" —to a particular statute; rather, these doctrines evolved solely as a matter of common law within the judiciary. When Congress enacted the Judicial Improvements Act of 1990, however, it attempted to combine and codify these doctrines under the rubric of "supplemental jurisdiction." *See* Judicial Improvements Act of 1990, § 310(a), Pub.L. 101-650, Dec. 1, 1990, 104 Stat. 5089, *codified at* 28 U.S.C. § 1367. One important question that has arisen is how this statute applies in diversity-based class action suits, and the degree to which it overrules certain Supreme Court precedents.

Before the enactment of § 1367, the Supreme Court had held that all plaintiffs in diversity-based class actions, including unnamed class members, had to meet the amount-in-controversy requirement set forth in the federal diversity statute, 28 U.S.C. § 1332, for diversity-based suits.[4] *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301, 94 S.Ct. 505, 512, 38 L.Ed.2d 511 (1973) ("Each plaintiff in a Rule 23(b)(3) class

[4] Interestingly, the Court excused unnamed plaintiffs from satisfying the other requirement of § 1332—diversity of citizenship. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366, 41 S.Ct. 338, 342, 65 L.Ed. 673 (1921) ("The intervention of the Indiana citizens in the [class action] suit [against defendants who were citizens of Indiana] would not have defeated the [district court's diversity] jurisdiction. . . ."). The Court never explained why it treated § 1332's diversity-of-citizenship and amount-in-controversy requirements differently, except to suggest that allowing unnamed plaintiffs to evade both requirements would open the floodgates to too much litigation in federal courts. *See Snyder v. Harris*, 394 U.S. 332, 340, 89 S.Ct. 1053, 1059, 22 L.Ed.2d 319 (1969) ("To allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law.").

action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case. . . ."). While the *Zahn* Court never expressly mentioned supplemental jurisdiction (or its antecedents, pendent and ancillary jurisdiction), the ruling's language was broad enough to preclude district courts from exercising any sort of jurisdiction over such plaintiffs. *See id.* at 301, 94 S.Ct. at 511 ("[A]ny plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims."). Put simply, a district court could not entertain claims by class members who did not allege at least the jurisdictional amount in damages (now $75,000), even if the named plaintiffs overcame this hurdle.

The Court based this conclusion on two considerations. First, it believed that the opposite holding would wreak havoc on the judiciary's workload. *See, e.g., Snyder v. Harris*, 394 U.S. 332, 340, 89 S.Ct. 1053, 1059, 22 L.Ed.2d 319 (1969) ("The expansion of the federal caseload could be most noticeable in class actions brought on the basis of diversity of citizenship. . . . To allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law."). Second, the Court recognized that Congress had relied upon this interpretation in continuously re-enacting § 1332's amount-in-controversy language. *Zahn*, 414 U.S. at 301, 94 S.Ct. at 512 ("[W]e have no good reason to disagree with . . . the historic construction of the jurisdictional statutes, left undisturbed by Congress over these many years."); *Snyder*, 394 U.S. at 339, 89 S.Ct. at 1058 (refusing to depart from "a judicial interpretation of congressional language that has stood for more than a century and a half," particularly where "Congress has consistently re-enacted its prior statutory language . . . in the face of a settled interpretation of that language").

The main issue in the case at hand, *Allapattah Serv. v. Exxon Corp.*, 333 F.3d 1248, 1255 (11th Cir.2003), is whether 28 U.S.C. § 1367 codifies or overrules *Zahn*'s approach to class actions. Put another way, does § 1367 allow district courts to exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions who fail to satisfy § 1332's amount-in-controversy requirement?[5]

The panel answered in the affirmative. It began its analysis by ascertaining that the *named* plaintiffs in the lawsuit satisfied § 1332's diversity-of-citizenship and amount-in-controversy requirements for invoking diversity jurisdiction. The panel then applied what it claimed was a plain-meaning interpretation of § 1367 to conclude that the district court could exercise supplemental jurisdiction over the *unnamed* plaintiffs' claims because they were sufficiently related to the *named* plaintiffs' claims as to "form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The panel observed that, since claims by unnamed plaintiffs in a class action are brought under Federal Rule of Civil Procedure 23, they do not fall within any of the exceptions to supplemental jurisdiction

[5] The question is limited to diversity-based class actions because the statute giving district courts jurisdiction over federal-question cases does not contain an amount-in-controversy requirement. Moreover, the question is limited to unnamed plaintiffs because, in order for a district court to exercise supplemental jurisdiction over certain parties' claims, it must be able to exercise substantive jurisdiction (e.g. diversity jurisdiction) over *someone's* claims. A court cannot exercise supplemental jurisdiction over the claims of everyone in the case; supplemental jurisdiction is parasitic—to even be potentially applicable, at least one person must meet the requirements for directly invoking the court's substantive (that is, non-supplemental) jurisdiction. Finally, the question is limited to § 1332's amount-in-controversy requirement because the Court already held in *Ben-Hur* that unnamed plaintiffs in diversity suits are excused from § 1332's diversity-of-citizenship requirement. *See* 255 U.S. at 366, 41 S.Ct. at 342; *see also supra* note 4.

specified in 28 U.S.C. § 1367(b). *Allapattah*, 333 F.3d at 1255. The panel expressly refused to consider § 1367's legislative history. *Id.* at 1255 n. 5 ("We, however, see no need to parse the legislative history to divine congressional intent with respect to § 1367, because we consistently have reiterated that the text of a statute controls and that we may not consider legislative history when the statutory language is unambiguous.") (internal quotations omitted). Consequently, under the panel's approach, as long as the claim of one plaintiff in a diversity-based class-action lawsuit satisfies both of § 1332's jurisdictional requirements, the court may exercise supplemental jurisdiction over all of the unnamed plaintiffs' claims, even if they meet *neither* of § 1332's requirements.

Although I believe the panel's ruling is erroneous, *see infra* Part III, and that this circuit should have reviewed the matter en banc, the more salient issue at this point is the fact that the circuit courts of appeals—indeed, the entire federal judiciary—is deeply divided over this issue. For the reasons set forth in this opinion, I urge the Supreme Court to seriously consider resolving this contentious, important question.[6]

[6] Part II of this opinion discusses the reasons why this case warrants a grant of certiorari from the Supreme Court. The circumstances under which the Supreme Court will grant a writ of certiorari (discussed in the main text) are quite similar to the circumstances that warrant this court considering a matter en banc:

> A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

Fed. R.App. P. 35(a). Consequently, my discussion in Part II as to why the Supreme Court should grant certiorari in this case is sufficient to

explain my disagreement with this court for failing to consider the matter en banc.

It is also appropriate to note that this was far from an ordinary en banc poll. According to Eleventh Circuit internal operating procedure, a strict majority of active court of appeals judges is required to vote to have a case heard en banc, regardless of the number of judges who may have recused from the case:

> Rehearing en banc may only be granted by affirmative vote of a majority of circuit judges in regular active service, as hereinafter provided. The recusal of a judge or judges does not affect the number of votes required for rehearing en banc to be granted. If, for example, there are 12 judges in regular active service on this court, one or more of whom are recused in a case, rehearing en banc may only be granted by affirmative vote of seven or more active judges.

Eleventh Circuit Internal Operating Procedure 35(3).

Because we have eleven active judges, it takes 6 judges to vote to hear a case en banc. In *Allapattah,* however, 4 active judges recused, leaving only 7 judges (including the author of the panel opinion below) to vote to hear the case en banc. As a result, once two judges voted against rehearing the case en banc, it became impossible to obtain the requisite number of votes and the poll was terminated. Consequently, the denial of an en banc rehearing should not be interpreted as necessarily reflecting the opinions of a majority of this court's members. It is, at best, a byproduct of our circuit's procedure for handling recusals in en banc polls.

Most other circuits take a different approach to recusals in en banc polls. Instead of requiring that a majority of *all* active judges on the court vote to rehear a case en banc, regardless of how many might be disqualified from that case, a good number of circuits instead require only that a majority of *non-recused* active judges vote to hear the case. *See 1st Cir. Local R.* 35(a) ("Rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified . . . ."); *2d Cir. Local R.* 35 ("Neither vacancies nor disqualified judges shall be counted in determining the base on which 'a majority of the circuit judges of the circuit who are in regular active service' shall be calculated . . . for purposes of ordering a hearing or rehearing en banc."); *3d Cir. Local R.* 35.3 ("For purposes of determining the majority necessary to grant a petition for rehearing, all circuit judges currently in regular service who are not disqualified will be counted."); *7th Cir. Operating Procedures* 5(d)(1) ("A simple majority of the *voting* active judges is required to grant a rehearing en banc.")

(emphasis added); *9th Circuit Gen. Orders* 5.5d ("If a majority of the non-recused active judges votes in favor of en banc consideration, the Chief Justice shall enter an order taking the case en banc . . . ."); *9th Circuit Gen, Orders Amnds.* 5.1(3) ("'Judge eligible to vote' means any active judge who is not recused or disqualified . . . ."); *10th Circuit R.* 35.5 ("A majority of the active judges who are not disqualified may order rehearing en banc."). It appears that the Sixth Circuit also follows this rule, but its local rules are somewhat ambiguous in this respect. *See 6th Cir. Internal Operating Procedure* 35(a) ("Only Sixth Circuit judges in regular active service and who have not recused themselves from the particular case may cast votes in a poll on the en banc petition itself."). Other circuits follow the Eleventh Circuit rule and count recused judges in determining the number of votes necessary for a rehearing en banc. *See 4th Cir. Local R.* 35(b) ("For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving, without regard to whether a judge is disqualified."); *5th Cir. R.* 35.6 ("Judges in regular active service who are disqualified for any reason . . . nevertheless shall be counted as judges in regular active service."); *8th Cir. Internal Operating Procedures* IV(D) ("A rehearing en banc is granted if a majority of judges in regular active service vote affirmatively."); *Fed. Cir. R.* 35(a) ("A case will be reviewed en banc if a majority of judges in regular active service agree to hear it en banc. Judges who are recused or disqualified from participating in the case are counted as judges in regular active service."); *D.C.Cir. Handbook of Practice & Internal Procedures* 58 ("On this question [of en banc rehearings] only active judges of the Court may vote, and a majority of all active judges, regardless of recusals or temporary absences, must approve rehearing en banc in order for it to be granted.").

In 1992, the Advisory Committee on Appellate Rules proposed the creation of a uniform national rule to govern the way in which recusals are counted in en banc polls, but this suggestion was withdrawn due to opposition from the Chief Judges of four circuits. The Chief Judges argued that "the method used by a circuit to convene an in banc [sic] hearing is a uniquely internal function . . . [and] that the courts of appeals have historically had the power to define the base from which a majority is determined. . . ." *Issues and Changes: Proposed Amendments to the Federal Rules of Appellate Procedure,* 147 F.R.D. 323, 330 (1991); *see also* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3981.1, at 616-17 (3d ed.1999) (discussing the right of each circuit to decide for itself the number of judges necessary for rehearing en banc).

II. The Supreme Court Should Grant Certiorari in This Case to Offer a Definitive, Uniform Interpretation of 28 U.S.C. § 1367

The Supreme Court should grant certiorari in this case to resolve the controversy over whether district courts may exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions. As Chief Justice Rehnquist recognized, "[a] high degree of selectivity is . . . enjoined upon [the Supreme Court] in exercising [its] certiorari jurisdiction." *Hubbard v. United States*, 514 U.S. 695, 720, 115 S.Ct. 1754, 1767, 131 L.Ed.2d 779 (1995) (Rehnquist, C.J., dissenting). Nevertheless, I believe this case presents exactly the type of circuit split on an issue of national importance that warrants the Court's attention.

Rule 10 of the Supreme Court provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power.
>
> . . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. This rule further notes, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Though the language of this rule is far from precise, the § 1367 issue contains most of the features that Rule 10 deems necessary (if not sufficient) for a question to warrant Supreme Court review.[7]

A. *Supreme Court Review is Warranted in Light of the Deep and Abiding Split Among Federal Circuit Courts of Appeals*

"[T]he 'single most important' factor for granting certiorari petitions . . . is a split within the circuits that have considered the issue below." Sanford Levinson, *Book Review: Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court*, 79 *Va. L.Rev.* 717, 726 (1993) (*quoting* H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 251 (1991)). No issue facing federal circuit courts of appeals

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[7] At first blush, it might appear unseemly for an individual circuit judge to advocate in a dissenting opinion that the Supreme Court grant certiorari in a particular case. In fact, this has been done by a number of judges in circuits across the country. *See, e.g., O'Neill v. United States*, 140 F.3d 564 (3d Cir.1998) (Becker, C.J., dissenting) ("I urge the Supreme Court to grant certiorari and reconsider *Feres* [*v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950)]"); *Brown v. Bryan Cty.*, 235 F.3d 944 (5th Cir.2000) (DeMoss, J., dissenting from denial of reh'g en banc) ("I state this as a matter for the public record in order to . . . encourage the Supreme Court to grant certiorari in this case and clearly decide the issue . . . ."); *see also Ass'n of Mexican-American Educators v. California*, 231 F.3d 572, 602 (9th Cir.2000) (Kleinfeld, J., concurring in part and dissenting in part) ("A decision like today's, where we set up an inter-circuit conflict on a matter of great national importance, is colloquially known among those of us who do appellate law for a living as 'cert bait.' That is to say, we have furnished the Supreme Court with a reason to grant a petition for certiorari."). Federal judges have an obligation to speak out with regard to the administration of our nation's justice system.

today has generated as deep and abiding a schism as the question of supplemental jurisdiction under § 1367. With the Eleventh Circuit's ruling in this case, five federal appellate courts are of the opinion that unnamed plaintiffs may invoke supplemental jurisdiction in diversity-based class actions without satisfying § 1332's amount-in-controversy requirement, while three courts adhere to the opposite conclusion.

Circuits (such as the Eleventh) maintaining that § 1367 extends supplemental jurisdiction to the claims of unnamed class members invariably rest their conclusions upon what they interpret to be the plain meaning of the statute. *See Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1254 (11th Cir.2003) ("[T]he language of § 1367 clearly and unambiguously overrules *Zahn* and allows a district court entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional minimum amount in controversy requirement."); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 117 (4th Cir.2001) ("Section 1367 is a broad grant of authority for supplemental jurisdiction, subject only to the express limitations in the Act; it does not contain unspoken limits on the statutory text. Thus, § 1367 plainly does not require that all class members must independently meet the amount in controversy requirement of § 1332.") (citation omitted); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 938 (9th Cir.2001) ("[T]he text of § 1367 is clear, and . . . it confers supplemental jurisdiction over the claims of class members in a diversity class action when named plaintiffs have claims with an amount in controversy in excess of $75,000."); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 931 (7th Cir.1996) ("[A]lthough . . . some legislative history suggests that the responsible committees did not expect § 1367 to upset *Zahn*, the text [of § 1367] is not limited in this way."); *Free v. Abbott Labs.*, 51 F.3d 524, 528 (5th Cir.1995) ("[Section 1367's] first section vests federal courts with the power to hear supplemental claims generally, subject to limited

exceptions set forth in the statute's second section. Class actions are not among the enumerated exceptions.").

As discussed in Part III, there are serious questions as to whether these decisions correctly interpret the statute's plain meaning. Indeed, several circuits conclude that the plain meaning of the statute requires them to reach the opposite conclusion.. *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir.1998) ("[I]n our view § 1367(a) and (b) can be read literally, and unambiguously, to require each plaintiff in a class action diversity case to satisfy the *Zahn* definition of 'matter in controversy' and to individually meet the $75,000 requirement."); *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 221 (3d Cir.1999) ("Our reading of [§ 1367] . . . convinces us that Section 1367 was not intended to substantially expand diversity jurisdiction. Setting aside the holding in *Zahn* (3)27 would have such an effect."); *see also Trimble v. Asarco, Inc.*, 232 F.3d 946, 961-62 (8th Cir.2000) (quoting several pages from the Tenth Circuit's holding in *Leonhardt* to demonstrate that the "plain meaning" of § 1367 prevents courts from exercising supplemental jurisdiction over unnamed plaintiffs' claims).

Such dissension among federal judges should make one reluctant to conclude that the statute's meaning is as "plain" as both sides insist that it is. While the statute's meaning may appear obvious to an individual reader, a court cannot responsibly declare language to be "clear" when, as a matter of empirical reality, significant numbers of jurists have reasonable, good-faith disputes over its meaning. A judicial fiat declaring a statute to be unambiguous does not make it so. *Leonhardt*, 160 F.3d at 640 ("[W]e recognize that it is difficult to argue persuasively that the statute is truly unambiguous when two circuit courts of appeal have reached the opposite conclusion from us, when a majority of district courts are in agreement with us . . . and when commentators are divided.").

Because a majority of the federal circuit courts of appeals have addressed this question and failed to come to a consensus—indeed, they have reached diametrically opposing views on the issue—the Supreme Court should exercise its certiorari jurisdiction to resolve this circuit split. The circuit courts have been wrestling with this issue on their own for close to a decade. In the absence of Supreme Court intervention, it is highly unlikely that this rupture will mend itself.

B. *The Split Over § 1367 Extends Beyond Circuit Courts of Appeals and Permeates the Entire Legal System*

The question of supplemental jurisdiction in diversity-based class actions has mired not only the circuit courts of appeals in confusion and disarray, but district courts and legal commentators, as well. The dissension among circuits has played out across district court opinions, learned treatises, law review articles, and even bar review books.[8] Such a conflict among district courts "has been recognized as a factor tending

[8] One well-known bar review outline refers to the circuit split without being able to state a definitive rule of law:

> (1) Does the Supplemental Jurisdiction Statute overrule *Zahn*?
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> Four of the United States Courts of Appeals—the Fourth, Fifth, Seventh, and Ninth Circuits—have held that the supplemental jurisdiction statute overrules *Zahn* and requires only that the claim of the class representative exceed $75,000. On the other hand, three other Courts of Appeals (the Third, Eighth, and Tenth Circuits) have rejected this argument and continue to require that each class member's claim meet the jurisdictional minimum. The split of authority on this issue remains.

Brian J. Sacks et al., *BarBri Bar Review—California, Civil Procedure* 35 (2003) (citations omitted). When doctrinal controversies reach the point where they are enshrined in bar review outlines, the situation practically calls out for resolution by the Supreme Court. It is unthinkable that aspiring lawyers can be told only that a wide-ranging controversy rages over the scope of federal courts' jurisdiction, and that the extent of a court's congressionally authorized power depends on the place in which one files suit.

to reinforce some other and more substantial basis for review. . . . Indeed, the importance of an issue for certiorari purposes can sometimes be identified by the degree of diverse and conflicting views that lower courts, as well as commentators, have expressed." Robert L. Stern et al., *Supreme Court Practice* 238 (8th ed.2002).

District courts have adopted a wide variety of approaches in interpreting § 1367.[9] Several district courts (agreeing with the Third, Eighth, and Tenth Circuits) found that the plain meaning of the statute squarely precludes unnamed plaintiffs in diversity-based class actions from invoking supplemental jurisdiction under § 1367 without meeting § 1332's amount-in-controversy requirement.[10] Many other courts have held

[9] Many of these cases address the exercise of supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions who fail to meet § 1332's amount-in-controversy requirement, where a named plaintiff meets that standard. A good number of these cases, however, address the closely-related question of whether courts may exercise supplemental jurisdiction over named co-plaintiffs who fail to meet § 1332's amount-in-controversy requirement in "regular" (non-class-action) civil suits where at least one of the other plaintiffs seeks at least the requisite amount in damages.

[10] *See, e.g., Duet v. Lawes*, No. 94-0739, 1994 WL 151095, at * 2, 1994 U.S. Dist. LEXIS 4755, at *7 (E.D.La. Apr. 7, 1994) (holding that the "original jurisdiction over a civil action" language in § 1367(a) renders supplemental jurisdiction unavailable to unnamed plaintiffs who do not meet § 1332's amount-in-controversy requirement); *Chee Chung Leung v. Checker Motors Corp.*, No. 93C2704, 1993 WL 515470, at *2, 1993 U.S. Dist. LEXIS 17174, at *5 (N.D.Ill.Dec. 7, 1993) ("[T]he implication [of § 1367(b)] is that plaintiffs without an independent ticket of entry to federal court should not be able to get into federal court by 'piggybacking' onto other claims which do satisfy the jurisdictional requirements."); *N. Am. Mech. Servs. Corp. v. Huberi*, 859 F.Supp. 1186, 1189 (C.D.Ill.1994) ("Section 1367(a) expressly provides that district courts do not have supplemental jurisdiction over state claims when another federal statute expressly provides otherwise. Section 1332 provides otherwise, and § 1367 does not overrule § 1332's aggregation rules."); *Borgeson v. Archer-Daniels Midland Co.*, 909 F.Supp. 709, 716

that the statute was sufficiently ambiguous to allow recourse to its legislative history, though they did not identify the specific provision of the statute that was held to be ambiguous or explain the source of their confusion.[11] Based on the statute's unusually clear legislative history, *see infra* Section III.C, such courts quickly agreed that unnamed plaintiffs in diversity-based suits may not use § 1367 as a way of evading § 1332.

A surprising number of courts that adopted this conclusion actually began their analyses by turning to the statute's legislative history without first ascertaining that its text is ambiguous.[12] One court even held that § 1367 should be

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(C.D.Cal.1995) ("[I]t is evident that the plain language of [§ 1367(a)] is entirely consistent with *Zahn*.").

[11] *See, e.g., Leroy Cattle Co. v. Fina Oil & Chem. Co.*, No. 93-1286-MLB, 1994 WL 151105, at *14, 1994 U.S. Dist. LEXIS 4802, at *47 (D.Kan. Mar. 2, 1994) ("[T]he meaning and purpose of § 1367, as it applies specifically to class actions, is neither 'unambiguous' nor 'clear' in the statutory language itself."); *Clement v. Occidental Chem. Corp.*, Nos. 94-1315 to 94-1317, 1994 WL 479155, at *6, 1994 U.S. Dist. LEXIS 12387, at *19 (E.D.La. Aug. 30, 1994) ("[T]he court finds that the meaning and purpose of 28 U.S.C. § 1367, as it applies specifically to class actions, is neither unambiguous nor clear in the statutory language itself."); *Daniels v. Philip Morris Cos.*, 18 F.Supp.2d 1110, 1114 (S.D.Cal.1998) ("[T]he Court finds that the statute is not clear and unambiguous on its face and, therefore, a review of the legislative history is appropriate."); *Kanter v. Warner-Lambert Co.*, 52 F.Supp.2d 1126, 1132 (N.D.Cal.1999) ("The language of section 1367 is ambiguous as to whether the statute was intended to overrule *Zahn*, but the legislative history is clear in that regard."); *Freeman v. Great Lakes Energy Partners, L.L.C.*, 144 F.Supp.2d 201, 210 (W.D.N.Y.2001) ("This court agrees with the district courts of this circuit, and with the Third Circuit, and finds that the language of sections 1367(a) and (b) is sufficiently ambiguous to make inquiry into its legislative history appropriate.").

[12] *See, e.g., Stoumen v. Pub. Serv. Mut. Ins. Co.*, No. 94-0233, 1994 WL 111355, at *2, 1994 U.S. Dist. LEXIS 4021, at *5 (E.D.Pa. Mar. 30, 1994) ("[T]he amendment's legislative history indicates that its drafters did not intend for the amendment to alter the jurisdictional requirements

interpreted according to its legislative history even if its plain meaning unambiguously extends supplemental jurisdiction to unnamed plaintiffs.[13]

A large number of other courts, also agreeing that unnamed plaintiffs did not qualify for supplemental jurisdiction, simply claimed that 1367's text and legislative history supported

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of diversity-based class actions as set forth in *Zahn*."); *Benfield v. Mocatta Metals Corp.*, No. 91 Civ. 8255(LJF), 1993 WL 148978, at *4, 1993 U.S. Dist. LEXIS 5856, at *18 (S.D.N.Y. May 3, 1993) ("[C]ommentators have also concluded that the legislative history to § 1367 does not support a finding that the statute was intended to overrule *Zahn*. Thus, absent some showing that Congress had such an intent, this Court declines to exercise supplemental jurisdiction over class members' claims for less than [the jurisdictional amount].") (citation omitted); *Mayo v. Key Fin. Servs., Inc.*, 812 F.Supp. 277, 278 (D.Mass.1993) ("The legislative history of 28 U.S.C. § 1367 clearly indicates, however, that the statute was not intended to affect the jurisdictional requirements for diversity class actions set forth in *Zahn*."); *Averdick v. Republic Fin. Servs., Inc.*, 803 F.Supp. 37, 45 (E.D.Ky.1992) ("To this court, subsection (b) forbids use of the concept of supplemental jurisdiction created by subsection (a) to expand jurisdiction in diversity cases. The legislative history noted by the treatise recognizes this. . . . The legislative history of § 1367(b) provides that 'the section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions.'"); *Griffin v. Dana Point Condo. Ass'n*, 768 F.Supp. 1299, 1302 (N.D.Ill.1991) (citing § 1367's legislative history for the proposition that "a dramatic change in established law is not within the purview of [§ 1367]"); *Tortola Rests., L.P. v. Kimberly-Clark Corp.*, 987 F.Supp. 1186, 1190 (N.D.Cal.1997) ("In light of the legislative history, and the ensuing case law relevant to the issue, this Court agrees with those courts that have found that the Judicial Improvements Act did not overrule the Supreme Court decision in *Zahn*.") (footnote omitted).

[13] *See Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F.Supp. 808, 817 (E.D.Pa.1997) ("[I]f section 1367 is to be taken at face value, it would appear to contemplate supplemental jurisdiction over diversity class actions. . . . But there is reason to question whether section 1367's apparent inclusion of diversity class actions . . . should be taken at face value [because the legislative history] flatly contradict[s] that reading of the statute.").

their position, without offering any explanation or elaboration.[14] Still others simply accepted this conclusion without offering any analysis or reasoning at all.[15]

This is not to suggest that district courts have unanimously embraced this construction of § 1367. Many district courts have come down the other way, concluding that so long as a named plaintiff in a diversity-based class action suit satisfies § 1332's diversity-of-citizenship and amount-in-controversy requirements, every other unnamed plaintiff in the suit can automatically tag along by invoking the court's supplemental jurisdiction under § 1367.[16] The split among district courts—

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[14] *See, e.g., Riverside Transp. v. Bellsouth Telecomm.*, 847 F.Supp. 453, 456 (M.D.La.1994) ("[T]he Supreme Court's holding in *Zahn* has not been overruled by § 1367. This conclusion is supported by the language and legislative history of § 1367, the Fifth Circuit's decision in *Watson* [*v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir.1992)], and a majority of cases which have interpreted § 1367."); *accord Neve Bros. v. Potash Corp.*, 866 F.Supp. 406, 413 (D.Minn.1994); *see also Bradbury v. Robertson-Ceco Corp.*, 92 C 3408, 1992 WL 178648, at *2, 1992 U.S. Dist. LEXIS 10888, at *6-7 (N.D.Ill.1992) ("This court is also persuaded that Section 1367 did not alter the requirements of *Zahn*.").

[15] *See, e.g., Aspe Arquitectos, S.A. de C.V. v. Jamieson*, 869 F.Supp. 593, 595 (N.D.Ill.1994) ("[F]ederal jurisdiction must exist independently over each plaintiff's claim—that is the teaching of the seminal decision in *Zahn v. International Paper Co.*, and it has not been changed by Section 1367's later enactment of the concept of supplemental jurisdiction. . . ."); *Kaplan v. Mentor Corp.*, No. 94 C 6249, 1994 WL 592081, 1994 U.S. Dist. LEXIS 15779 (N.D.Ill.1994) (same); *Dirosa v. Grass*, No. 94-2551, 1994 WL 583276, at *2, 1994 U.S. Dist. LEXIS 15100, at *7 (E.D. La.1994) ("The recently enacted supplemental jurisdiction statute, 28 U.S.C. § 1367, does not change [*Zahn*'s] requirement.").

[16] *Forest v. Penn Treaty Am. Corp.*, 270 F.Supp.2d 1357, 1363 (M.D.Fla.2003) ("Upon a thorough review of the caselaw, the Court concludes that utilizing the plain meaning of the statute, the effect of *Zahn* has been abrogated by § 1367."); *Chapman Funeral Home, Inc. v. Nat'l Linen Serv.*, 178 F.Supp.2d 1247, 1255 (M.D.Ala.2002) ("Under the plain language of the statute, this court must conclude that *Zahn* is statutorily abrogated."); *Lindsay v. Kvortek*, 865 F.Supp. 264, 276 (W.D.Pa.1994) ("Although this area of the law is far from clear, the Court should apply § 1367 as written and exercise supplemental jurisdiction over Court [sic] II of the Amended Complaint."); *Garza v. Nat'l Am. Ins. Co.*, 807 F.Supp. 1256, 1258 (M.D.La.1992) ("Congress said what it meant and . . . meant what it said—the language of § 1367 unavoidably overrules these pre-§ 1367 cases in those instances where the requirements of § 1367(a) are fulfilled and the exceptions of § 1367(b) are inapplicable.").

regarding both the ultimate outcome of § 1367 cases as well as the widely divergent interpretive strategies being deployed—is deeply troubling. This morass of rulings not only leaves the area of supplemental jurisdiction unsettled, but raises important questions about proper techniques of statutory interpretation that can have ramifications for cases involving almost any federal law.

To fully appreciate the sheer magnitude of this interpretive schism, it is necessary to look beyond judicial opinions to the wider world of legal literature. The majority of major legal treatises argue that § 1367 overrules *Zahn*, although a few treatises have vacillated on this issue over the years. For instance, the latest edition of *Moore's Federal Practice* argues that § 1367 allows courts to exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions:

> [B]y its express terms, Section 1367 would appear to overrule *Zahn*. Nevertheless, there is some legislative history to the statute that expressly states that this was not the Congressional intent. The circuits have split on the issue of whether *Zahn* remains good law. . . . The better view is that *Zahn* was overruled by the passage of the supplemental jurisdiction statute, despite the legislative history to the contrary. When the plain language and the legislative history of a statute conflict, the plain language should control unless its application would lead to absurd results.

5 *Moore's Federal Practice* § 23.07[3][c], at 23-47 to 23-48 (3d ed.2003); *see also* 16 *id.* § 106.44, at 106-61 to 106-66.4. A previous edition of *Moore's*, however, took the exact opposite approach, declaring, "[T]he 1990 supplemental jurisdiction statute does not overrule *Zahn* and will not affect class actions." 1 *Moore's Federal Practice* § 97[5], at 927,[17] *quoted in* Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 19 *Seton Hall Legis. J.* 157, 181 n.144 (1994).

Charles Alan Wright's treatise on federal courts likewise argues that supplemental jurisdiction extends to unnamed plaintiffs in class actions:

> The rule in class actions had been that only the citizenship of the named parties was considered, but that each member of the class, whether named or unnamed, must satisfy the jurisdictional-amount requirement. [Section 1367] was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions," as those requirements were interpreted prior to *Finley*. Unless the legislative history is to prevail over the plain language of the statute, however, the broad grant of supplemental jurisdiction in § [1367(a)] and the failure to include Rule 23 in the limitations on supplemental jurisdiction in § 1367(b) must mean that if one member of a class has a claim that satisfies the jurisdictional-amount requirement, other persons with smaller claims can be included in the class.

Charles Alan Wright, *Law of Federal Courts* 39 (1994) (internal citation omitted). The most recent edition of the Wright & Miller treatise fails to take a stand on the issue, *see* Wright & Miller, *Federal Practice and Procedure* 175 (2003 Supp.), but the 1998 edition apparently found that § 1332's

[17] Because this source has been superceded, it has been impossible to obtain a copy to verify this citation.

amount-in-controversy requirement applied to unnamed plaintiffs, notwithstanding § 1367. *See* 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3523.1 (1998)[18] (arguing that *Zahn* is not abrogated by § 1367), *cited in Chapman*, 178 F.Supp.2d at 1250-51. The latest Hart & Weschler treatise, in contrast, does not defend either side. *See* Richard H. Fallon, et al., *Hart & Weschler's The Federal Courts and the Federal System* 926-30, 1490-93 (5th ed.2003).

Academic commentators have offered an even broader range of opinions on this question, with the weight of articles arguing that *Zahn* remains good law.[19] In short, the war over

[18] Because this source has been superceded, it has been impossible to obtain a copy to verify this citation.

[19] *Compare* James E. Pfander, *The Simmering Debate Over Supplemental Jurisdiction*, 2002 *U. Ill. L.Rev.* 1209, 1231 (arguing that an interpretation of § 1367 allowing unnamed plaintiffs to evade the amount-in-controversy requirement does not "fit with the rest of the law") (internal quotations omitted); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 *U. Pa. L.Rev.* 109, 148 (1999) (arguing that § 1367(a) does not permit courts to exercise supplemental jurisdiction over unnamed plaintiffs because "[t]he established rules of *Zahn* . . . form a part of the jurisdictional requirements in diversity proceedings, and they were incorporated into section 1367(a) by reference. Congress thus had no reason to create any explicit exception in 1367(b) for claims by plaintiffs joined under . . . Rule 23. . . ."); Laura L. Hirschfeld, *The $50,000 Question: Does Supplemental Jurisdiction Extend to Claims Between Diverse Parties Which Do Not Meet 1332's Amount-in-Controversy Requirement?*, 68 *Temple L.Rev.* 107, 110 (1995) (arguing that "application of supplemental jurisdiction to diversity claims of less than [§ 1332's amount-in-controversy specification] is an erroneous interpretation of Congress's intent in enacting the statute"); Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 19 *Seton Hall Legis. J.* 157, 192 (1994) ("The best approach is to reaffirm the Supreme Court's position in *Zahn* and *Ben Hur*."); Thomas D. Rowe, Jr., et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 *Judicature* 213, 215 (1991) ("[T]he Supreme Court's holdings that only the named

§ 1367 has raged for over a decade with no end anywhere in sight. Only a Supreme Court ruling on this subject can bring uniformity to the law and definitively establish the scope of the jurisdiction of the federal courts. If the Supreme Court does not grant certiorari in this case, appellate courts, district courts, commentators, and attorneys will simply continue to talk past each other, deploying an unbelievably wide array of interpretive canons to reach radically divergent conclusions as to the scope of § 1367. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 46-47, 97 S.Ct. 2549, 2556, 53 L.Ed.2d 568 (1977) (noting that certiorari was granted on a legal question that "has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts").

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class representatives must satisfy the citizenship requirement of 1332 but that all class members must satisfy the amount in controversy requirement, remains good decisional law."); *with* Richard D. Freer, *Toward a Principled Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 *Ind. L.J.* 5, 18 (1998) (claiming that "[a]ll observers agree that the supplemental-jurisdiction statute, on its face, overrules *Zahn*"); Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 *Ind. L.J.* 181, 185 (1998) (arguing that, in enacting § 1367, "Congress inadvertently overruled a long line of cases involving multiple plaintiffs in which the courts had consistently disallowed the use of supplemental jurisdiction to support the claims of those plaintiffs who failed to satisfy the amount in controversy requirement of the diversity statute"); Afshin Ashourzadeh, Comment, *Supplemental Jurisdiction in Class Action Lawsuits: Recovering Supplemental Jurisdiction From the Jaws of Aggregation*, 26 *Sw. U.L.Rev.* 89, 120 (1996) ("Section 1367, by its plain meaning, permits plaintiffs in the 'composite' scenario to participate in the class action even if they do not satisfy the jurisdictional amount requirement."); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 *Emory L.J.* 963, 981 (1991) ("[T]he statutory language of section 1367 overrules *Zahn* and permits jurisdiction over diversity of citizenship class actions, even when the claims of some class members do not satisfy the jurisdictional amount in controversy.").

C. *The Supreme Court Should Grant Certiorari Because of the Overriding Importance of the Supplemental Jurisdiction Question*

Of course, the mere existence of even a gaping interpretive chasm has never been sufficient in itself to assure a grant of certiorari from the Supreme Court. As Supreme Court Rule 10 emphasizes, the Court will entertain only "important matter[s]" or "important question[s] of federal law." *Sup.Ct. R.* 10(a), (c); *see, e.g., Aldinger v. Howard*, 427 U.S. 1, 3, 96 S.Ct. 2413, 2415, 49 L.Ed.2d 276 (1976) (noting that certiorari was granted "to resolve the conflict on this important question"); *Jaffee v. Redmond*, 518 U.S. 1, 7-8, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (noting that certiorari was granted "[b]ecause of the conflict among the courts of appeals and the importance of the question").

Admittedly, there are a variety of ways in which the Court can interpret this standard. "Importance is a relative factor, dependent upon the type of issue involved, the way in which it was decided below, the status of the law on the matter, the correctness of the decision below, and the nature and number of persons who may be affected by the case." Stern, *supra* at 244. Nevertheless, by almost any criteria the Court might use to determine the importance of a legal issue, the question of supplemental jurisdiction under § 1367 warrants its careful scrutiny. *See, e.g.*, Wright & Miller, *Federal Practice and Procedure* 175 (2003 Supp.) ("This uncertainty in such an important area of federal jurisdiction [supplemental jurisdiction], in which rules should be clear, is extremely lamentable.").

1. *Section 1367 warrants the Court's attention because it raises jurisdictional issues*—The Supreme Court should grant certiorari in this case to offer a definitive interpretation of the scope of the jurisdictional grant contained within § 1367. Questions concerning the scope of jurisdiction of Article III courts are of critical importance. "It is a fundamental precept

that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978).

The Chief Justice has recognized how crucial it is to ensure that federal courts abide by congressionally imposed limits on their jurisdiction. "[A]n . . . important consequence of the disregard of congressional provisions as to our jurisdiction is a tendency to weaken the authority of this Court when it can demonstrate in a principled manner that it has either the constitutional or statutory authority to decide a particular issue." *Davis v. Jacobs*, 454 U.S. 911, 919, 102 S.Ct. 417, 422, 70 L.Ed.2d 226 (1981) (Rehnquist, J., dissenting); *see also Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 95-96, 98 S.Ct. 2620, 2642, 57 L.Ed.2d 595 (1978) (Rehnquist, J., concurring) (explaining that the preservation of "limitations on district court jurisdiction as carefully defined in our statutes and cases . . . . is in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important.").

"Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 1570, 143 L.Ed.2d 760 (1999). The importance of subject-matter jurisdiction is further demonstrated by the fact that courts may—indeed, must—consider such questions *sua sponte* at every stage of the proceedings. *See United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 1785, 152 L.Ed.2d 860 (2002) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-

matter jurisdiction require correction regardless of whether the error was raised in district court.").

It is precisely because adherence to jurisdictional limitations is so important in maintaining the delicate balance of power among the various branches of the federal government that the Supreme Court frequently grants certiorari to resolve jurisdictional controversies. *See, e.g., United States v. Hohri*, 482 U.S. 64, 68, 107 S.Ct. 2246, 2249, 96 L.Ed.2d 51 (1987) (noting that the "importance of the jurisdictional question," as well as "the potentially broad impact of the Court of Appeals' decision," warranted certiorari); *see also* Stern, *supra* at 253 ("Among the many cases falling within this category [of being sufficiently important to warrant certiorari] are those involving the jurisdiction of federal district courts.") (citing *Bruner v. United States*, 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952)). *But see K-Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 191, 108 S.Ct. 950, 960, 99 L.Ed.2d 151 (1988) (Scalia, J., dissenting) ("In a court that selects its docketed cases on the basis of the general importance of the issues they present, jurisdictional questions tend to get short shrift.").

It is inconceivable that such uncertainty about § 1367—an important font of subject-matter jurisdiction for the federal courts—should be permitted to persist for so long. If the majority of circuits are correct in holding that § 1367 permits the exercise of supplemental jurisdiction in diversity-based class actions, then a good number of other federal courts are wrongfully abiding by an unduly narrow conception of their powers. Such courts are failing in their constitutional duty to exercise the jurisdiction that has been granted them and decide cases that are properly before them. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712, 1720, 135 L.Ed.2d 1 (1996) ("[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236,

1246, 47 L.Ed.2d 483 (1976) (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). If, on the other hand, unnamed plaintiffs may not invoke supplemental jurisdiction under § 1367, then the majority of courts are acting well beyond the scope of their congressionally authorized powers, and entering binding judgments in cases they lack the fundamental power to decide in the first place. "Jurisdiction is power to declare the law. . . . [I]f there is no jurisdiction there is no authority to sit in judgment of anything else." *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 778, 120 S.Ct. 1858, 1865, 146 L.Ed.2d 836 (2000); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818, 108 S.Ct. 2166, 2179, 100 L.Ed.2d 811 (1988) (noting "[t]he age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists"). Whatever the ultimate merits of the § 1367 issue, the fact remains that a large number of courts—unelected judges who are not democratically accountable—are either abdicating or abusing their authority; maintenance of such a status quo is intolerable.

2. *The supplemental jurisdiction question raises important federalism issues*—The Supreme Court has always shown a special solicitude toward policing the boundaries of our federal system of government and protecting the limited independence and sovereignty of states guaranteed by the Tenth Amendment. Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 *Okla. L.Rev.* 727, 751 (2001) ("The data indicate[s] that the Supreme Court was more likely to grant a petition for certiorari if one or more of the legal issues involved an allegation of a federalism issue than if the petition did not involve such an issue."); *see, e.g., United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (invalidating a federal statute that exceeded the scope of Congress's powers and encroached upon states' police

powers); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 79, 120 S.Ct. 631, 643, 145 L.Ed.2d 522 (2000) (invalidating a federal statute enacted under an Article I, § 8 congressional power that allowed states to be sued as inconsistent with states' rights under the Eleventh Amendment); *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (invalidating a federal statute requiring state officials to participate in a federal law enforcement scheme).

This generalized dedication to preserving the traditional functions of states is even more apparent in cases where the Court is called upon to protect state courts from undue federal encroachment. In the realms of habeas corpus and abstention, the Court has consistently played a vital role in ensuring that federal courts do not upset the balance of power between the federal government and the states by adjudicating disputes that are constitutionally or statutorily entrusted to state tribunals. *See, e.g., Calderon v. Coleman*, 525 U.S. 141, 146, 119 S.Ct. 500, 503, 142 L.Ed.2d 521 (1998) ("A federal court upsets this careful [state-federal] balance when it sets aside a state-court conviction or sentence without first determining that the error had a substantial and injurious effect on the jury's verdict."); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941) ("These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary.") (*quoting Cavanaugh v. Looney*, 248 U.S. 453, 457, 39 S.Ct. 142, 63 L.Ed. 354 (1919)). Such cases are premised upon the importance of maintaining a proper relationship between the state and federal judicial systems. *See, e.g., Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971) (explaining the centrality of comity between the federal and state judiciaries to "Our Federalism").

The question of supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions raises important questions of federalism and the respective roles of the federal and state judicial systems. Diversity-based suits necessarily involve questions of state law, which should presumptively be left to state tribunals. *See Speiser v. Randall*, 357 U.S. 513, 523 n. 7, 78 S.Ct. 1332, 1340 n. 7, 2 L.Ed.2d 1460 (1958) (noting the "basic constitutional principle that the construction of state laws is the exclusive responsibility of the state courts"). More importantly, if § 1367 does not permit federal courts to exercise supplemental jurisdiction over unnamed plaintiffs, then large portions of the federal judiciary are adjudicating disputes that are properly within the exclusive jurisdiction of state courts. Conversely, if § 1367 permits the exercise of supplemental jurisdiction, then a good number of circuits are improperly compelling many plaintiffs to confine their claims to state court, thereby denying them their right to a federal forum. Again, regardless of the proper interpretation of § 1367, the question has important implications for federalism—another factor warranting a grant of certiorari.

3. *Section 1367 raises important questions concerning statutory interpretation with potentially wide-ranging implications for other statutes*—This case raises several important questions of statutory interpretation that, in themselves, warrant careful consideration by the Supreme Court. *See, e.g., Shapiro v. United States*, 335 U.S. 1, 4, 68 S.Ct. 1375, 1377, 92 L.Ed. 1787 (1948) (noting that certiorari was granted "[b]ecause this conflict involves an important question of statutory construction"). As noted earlier, district courts have employed a wide range of canons of interpretation and arrived at mutually inconsistent conclusions as to § 1367's meaning. In determining which interpretation of § 1367 is the most accurate, this Court will also necessarily resolve interpretive issues of great import even beyond this case.

First, the Court might determine the point at which a deep split among courts allows a judge to conclude that, as an empirical matter, a statute is ambiguous. Second, the Court might consider the range of circumstances under which the *expressio unius* canon of interpretation is an appropriate tool for construing whether a list of exceptions (such as § 1367(b)) is exclusive.[20] *See, e.g., SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350, 64 S.Ct. 120, 123, 88 L.Ed. 88 (1943) ("However well [statutory canons such as *expressio unius*] may serve at times to aid in deciphering legislative intent, they have long been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose. . . ."). Moreover, it might clarify whether a statute's legislative history is a legitimate guide for determining when to apply *expressio unius*. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 760, 154 L.Ed.2d 653 (2003) ("We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.").

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[20] Many courts and commentators point out that § 1367(a) confers supplemental jurisdiction to district courts, while § 1367(b) carves out claims brought under various Rules of Civil Procedure from this jurisdictional grant. Rule 23, governing class actions, is not among the rules specified in § 1367(b) over which district courts are prohibited from extending supplemental jurisdiction. It has been argued that, under the *expressio unius* canon, we must assume that the exclusion of class actions from § 1367(b)'s list of exceptions to supplemental jurisdiction was intentional. Consequently, it is claimed, there is no reason for excluding class actions under Rule 23 from § 1367(a)'s grant of supplemental jurisdiction. As a result, district courts may exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions.

Of course, the legitimacy of this common argument rests entirely on the applicability of the *expressio unius* canon. As the Court has recognized, however, "[t]he maxim expressio unius est exclusio alterius is an aid to construction, not a rule of law," *Neuberger v. Commissioner*, 311 U.S. 83, 88, 61 S.Ct. 97, 101, 85 L.Ed.2d 58 (1940), and may not be applicable in every case. *See infra* Section III.A.

Third, the Court could explain the circumstances under which the "barking dog" canon of statutory construction may be applied. Under the Barking Dog Canon, general language in a statute should not be interpreted as applying to a specific, particularly controversial situation if there is no recognition whatsoever in the statute's text or legislative history that it would have had such an effect. *See, e.g., Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342-43, 119 S.Ct. 765, 779, 142 L.Ed.2d 797 (1999) ("[I]t tests the limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in the method of conducting the decennial census since its inception."); *Chisom v. Roemer*, 501 U.S. 380, 396 & n. 23, 111 S.Ct. 2354, 2364 & n. 23, 115 L.Ed.2d 348 (1991) ("[I]f Congress had such an intent, [it] would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment. . . . Congress's silence in this regard can be likened to the dog that did not bark."); *Church of Scientology v. IRS*, 484 U.S. 9, 108 S.Ct. 271, 276, 98 L.Ed.2d 228 (1987) (Rehnquist, C.J.) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.").

It has been argued that this is an appropriate case for applying the barking dog canon. Virtually eliminating § 1332's amount-in-controversy requirement in diversity-based class actions, effectively overruling Supreme Court cases (including *Snyder* and *Zahn*), and throwing the doors of the federal courthouse open to a wide range of claimants who, throughout most of this country's history, would have been limited to state court are all major, important, and controversial changes that we would normally have expected Congress to specifically address somewhere either in the text of the statute or the legislative history.

Indeed, the Court itself used a variation of the barking dog argument in coming to its decision in *Zahn*:

> It also seems to us that the application of the jurisdictional amount requirement to class actions was so plainly etched in the federal courts prior to 1966 that had there been any thought of departing from these decisions and, in so doing, of calling into question the accepted approach to cases involving ordinary joinder of plaintiffs with separate and distinct claims, some express statement of that intention would surely have appeared, either in the amendments themselves or in the official commentaries.

Zahn, 414 U.S. at 302, 94 S.Ct. at 512.

Fourth, the Court will be able to explain more fully the proper role of legislative history in statutory interpretation. More specifically, it will be able to answer whether there is ever a point at which, as many district judges seem to have assumed, crystal-clear legislative history can be relied upon to narrow the scope of otherwise broad, general language in a statute. Similarly, the Court would be able to determine definitively whether there can ever be a basis for enforcing legislative history over statutory language when the two are diametrically opposed.

Finally, the Court would be able to give guidance in applying the "substantive" canons of statutory construction to cases such as this. Examples include the directive to construe jurisdictional grants narrowly, *see Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 408, 79 S.Ct. 468, 499, 3 L.Ed.2d 368 (1959) ("[I]t is, finally, true that this Court has adhered to a policy of construing jurisdictional statutes narrowly."), and the doctrine of avoiding interpretations that

aggrandize the jurisdiction of federal courts at the expense of the states, *see Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934) ("Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Foreward: Law as Equilibrium*, 108 *Harv. L.Rev.* 26, 102-04 (1994) (listing substantive canons of construction based on respect for federalism-related principles). In light of the unique spectrum of interpretive questions with potentially wide-ranging implications raised by the § 1367 issue, the Court should not hesitate to grant certiorari.

4. *Large numbers of people are affected by diversity-based class actions*—Another way of gauging the importance of an issue is by assessing the number of people it affects. *See* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 *Tex. L.Rev.* 1251, 1254 (1989) ("Importance, in this context, generally refers to the abstract significance of the underlying issue without regard to the existence of the conflict. How many people does the statute affect? How great an impact does the statute (or challenged interpretation) have?") (internal quotations omitted); Timothy S. Bishop & Jeffrey W. Sarles, *Earning Your Quill: How to Petition the United States Supreme Court for Certiorari*, 11 *Chicago Bar Ass'n Rec.* 16, 20 (1997) ("The best way to meet this burden [earning certiorari] is to show that the decision below has a significant impact not just on the petitioner but on a whole industry or large segment of the population."). The question of whether courts may exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions has already affected hundreds of thousands, if not millions of people, corporations, and other businesses, and promises to continue to do so well into the future.

It is very difficult to find reliable statistical data on diversity-based class actions in general, much less such suits that specifically involve supplemental jurisdiction. Consequently, to determine the importance of this issue in terms of certain empirical factors (money at stake, number of people affected, potential expansion of the federal courts' caseload), it is necessary to extrapolate from what data we have available about class actions in general, and rely on anecdotal evidence derived from opinions in individual diversity-based class action suits where supplemental jurisdiction was actually invoked.

The Federal Judicial Center commissioned a study by Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic that examined all class action suits in four major judicial districts that terminated between July 1, 1992 and June 30, 1994.[21] Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 4 (1996), *available at* http:// www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$File/rule23.pdf (last referenced Feb. 18, 2004). While the study did not uncover any hard and fast data on the ultimate size of certified classes, "[t]he median number of recipients of notice of certification or settlement (or both) was substantial,

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[21] The districts covered in the study are the Eastern District of Pennsylvania (including Philadelphia), the Northern District of Illinois (including Chicago), the Southern District of Florida (including Miami), and the Northern District of California (including San Francisco). Willging, *supra* at 4. The study's authors emphasize,

> Because this study did not employ random sampling or control or comparison groups, our results cannot and should not be viewed as representative of all federal district courts nor should causal inferences be drawn from the data. On the other hand, we have no reason or data that would lead us to believe that these districts are unusual or that they present a picture that is radically different from what one would expect to find in other large metropolitan districts.

Id. at 5.

ranging from approximately 3,000 individuals in one district to over 15,000 in another." *Id.* at 9. Some classes, of course, were much larger than these medians. "The average size of the class [in cases where individual class member recovery was under $100 per member] was 45,055 and the median size was 45,920 members." *Id.* at 14.[22]

Turning to specific cases that actually involve the question of whether courts may exercise supplemental jurisdiction over unnamed plaintiffs who fail to meet § 1332's amount-in-controversy requirement, we see that hundreds of thousands of people have already been affected by various courts' resolutions of this issue. The few cases that expressly reveal the number of people in the class suggest that we are dealing with large numbers of people. *See, e.g., Allapattah*, 333 F.3d at 1251 ("This case arises out of a class suit filed by approximately 10,000 Exxon dealers. . . ."); *Trimble*, 232 F.3d at 950 (noting that the case involved "a putative class of over 30,000 current and future residents of a geographic area near a former lead smelter and refinery"); *Forest*, 270 F.Supp.2d at 1359 & n. 2 (noting that the class involved "approximately 30,000 policy holders" whose health insurance premiums allegedly had been wrongfully increased by their insurance company). While many cases do not cite the specific number of class members, their descriptions of the classes or putative classes suggest that thousands—perhaps tens of thousands—of people are involved. *See, e.g., Daniels*, 18 F.Supp.2d at 1111 n. 1 (noting that the class was comprised of Californians who "in the last four years, would likely have been deceived by Defendants' deceptive warning labels and advertising campaigns as to the addictive nature of cigarettes, and that have become addicted to cigarettes due to

[22] To the degree that these are diversity rather than federal question suits, it is fair to assume that most of them involved supplemental jurisdiction since the amount recovered—less than $100 per class member—is far less than § 1332's amount-in-controversy requirement.

the addictive nature of nicotine"); *Borgeson*, 909 F.Supp. at 712 (noting that the class involved purchasers of corn syrup); *Kanter*, 52 F.Supp.2d at 1128 (noting that the class involved all Californians who purchased a particular, allegedly defective head-lice treatment).

While many other class actions involving supplemental jurisdiction affect much smaller groups, the sheer number of such suits is further evidence that significant numbers of people nationwide will be affected by resolution of the supplemental jurisdiction issue. *See, e.g., Clement*, 1994 WL 479155, at *1, 1994 U.S. Dist. LEXIS 12387, at *1 (noting that class was comprised of people injured by the emission of toxic substances in the wake of an explosion at a chemical plant); *Freeman*, 144 F.Supp.2d at 203-04 (noting that the class was comprised of owners of royalty interests in natural gas wells who were victimized by an alleged gas-reseller conspiracy to underpay them); *Benfield*, 1993 WL 148978, at *1 n. 1, 1993 U.S. Dist. LEXIS 5856, at *1 n. 1 (noting that class involved all people who purchased certain "dealer options" from a particular seller); *Chapman*, 178 F.Supp.2d at 1248 (noting that the class included member businesses from across the country—including a funeral home and Outback Steakhouses—that utilized a particular linen service); *Bradbury*, 1992 WL 178648, at *1, 1992 U.S. Dist. LEXIS 10888, at *1 (noting that the class included all employees of Robertson-Ceco Corp. and United Dominion Industries who had been denied overtime pay for the year 1991); *Russ*, 961 F.Supp. at 809 (noting that the class included all people allegedly tricked into waiving certain rights by an insurance company).

In short, this is not an obscure issue affecting small groups of people, but one that has tremendous ramifications for millions of class-member plaintiffs (and potential class-member plaintiffs) nationwide, as well as the large corporations and businesses who regularly get sued by them.

5. *Large amounts of money are at stake in diversity-based class actions*—"The fact that especially large amounts of money are involved in litigation over [an] issue of statutory construction may also be a persuasive factor" to the Supreme Court in deciding to grant certiorari. Stern, *supra* at 248.[23] The sheer number of diversity-based class actions, as well as the number of people involved in each, means that each year tens of millions of dollars hinge on resolution of the supplemental jurisdiction question. If unnamed plaintiffs in such suits are exempt from § 1332's amount-in-controversy requirement, defendants may find themselves liable for millions of dollars for which, under an alternate construction of § 1367, they could not be sued in federal court by those unnamed plaintiffs.

Again, we do not have the data necessary to determine exactly how much money has been awarded in recent years in federal diversity-based class actions implicating § 1367. Nevertheless, the data for class actions in general demonstrates that significant amounts of money have changed hands. The Willging study revealed that the median recovery to individual class members in federal class actions between 1992-94 ranged from $315 to $528, while the maximum awards ranged from $1,505 to $5,331 per class member. Willging, *supra* at 7. Even in cases where individual class members did not receive a large amount of money, the total dollar amounts at stake was often substantial. In cases where recovery was less than $100 per class member, "the average award to the class was $2.63 million and the median award was $2.55 million." *Id.* at 14.

[23] Stern goes on to point out that the amount of money potentially at issue is not "always sufficient by itself unless the amount is enormous." Stern, *supra* at 248. Needless to say, the amount of money potentially in question in diversity-based class actions is only one of numerous factors that makes the supplemental jurisdiction question eminently worthy of certiorari.

Theodore Eisenberg and Geoffrey P. Miller conducted a more recent study on attorney fees in class action cases. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study* (2003), *available at* http://www.stern.nyu.edu/clb/WP2003/03-017.pdf (last referenced Feb. 18, 2004). They reviewed "data on all state and federal class actions with reported fee decisions between 1993 and 2002, inclusive, in which the fee and class recovery could be determined with reasonable confidence." *Id.* at 2.[24] According to this report, "the mean gross recovery [in class action suits] was $100 million in inflation-adjusted 2002 dollars, and the median gross recovery was $11.6 million. . . . A few large awards led to unusual peaks in the mean for the reported opinion data at over $200 million in 1994 and 2000. . . . [A] relatively high period from 1999 to 2002 ends with the median award at $15 million." *Id.* at 16-17. While these numbers are likely to be higher than the amounts recovered only in federal suits, they nevertheless give us good reason to believe that significant amounts of money are at stake in diversity-based class federal class actions.

6. *Diversity-based class actions comprise a substantial portion of the judiciary's caseload*—Another crucial reason why the Court should address the supplemental jurisdiction issue is because of the effect that it could have on the already overburdened caseload of the federal courts. As the Chief Justice recognized in his 2003 annual address, the federal judiciary's workload is at a "record high[ ]." Chief Justice William Rehnquist, *2003 Year-End Report on the Federal*

[24] Again, this data is somewhat problematic for our purposes because it not only contains *all* federal class actions (rather than only diversity-based class action suits involving supplemental jurisdiction), but state class action suits, as well. Nevertheless, the statistical aggregates it offers should at least give us a general idea as to the amount of money at stake in the subset of class actions on which this opinion focuses.

Judiciary (Jan. 1, 2004), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html (last referenced Feb. 18, 2004); *see also Williams v. United States*, 535 U.S. 911, 920, 122 S.Ct. 1221, 1227, 152 L.Ed.2d 153 (2002) (Breyer, J., dissenting) (noting "rapidly rising caseloads" in the federal courts).

The supplemental jurisdiction question warrants certiorari review because of the impact it will have on this already overextended docket. As of Sept. 30, 2003, there were 630 diversity-based class actions pending in federal court. Administrative Office of the Courts, *Judicial Business of the U.S. Courts: Annual Report of the Director for the Year Ended September 30, 2003* Table X-5 *U.S. District Courts Class Action Civil Cases Commenced by Basis of Jurisdiction and Nature of Suit During the 12-Month Period Ending September 30, 2003* (unpublished manuscript; page number unavailable). It is fair to assume that a substantial number of these claims involve supplemental jurisdiction (it seems unlikely that each class member in each of these cases is seeking over $75,000 in damages). Given that, as of Jan. 4, 2004, there were only 653 sitting federal district court judges, *see* Rehnquist, *Year-End Report, supra*, the § 1367 issue affects the equivalent of one case on the docket of almost every district judge in the nation.

It is also important to recognize that class actions suits tend to be among the more lengthy and complicated cases. According to the Willging report, it took district judges a median time of between 2.8 months in the quickest district and 8.5 months in the slowest to rule on certification. Willging, *supra* at 8. Summary judgment in such cases sometimes does not occur until after at least a year of litigation. *Id.* Even circuit court dockets are not immune from the effects of such cases; appeals are filed in between 15-34% of them. *Id.* at 11. If it turns out that district courts lack jurisdiction under § 1367 over most of the claims at issue in

these suits, the result could be a partial alleviation of the judiciary's near-crushing caseload. This prospect is itself sufficiently important to warrant the Court's attention.

7. *The supplemental jurisdiction question implicates the separation of powers between Congress and the judiciary*— The supplemental jurisdiction issue also raises crucial separation of powers concerns. The importance of maintaining a proper balance among the powers of the three branches of the federal government is not only a structural end in itself, but is essential to the preservation of freedom in this country. "Liberty is always at stake when one or more of the branches seeks to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450, 118 S.Ct. 2091, 2109, 141 L.Ed.2d 393 (1998) (Kennedy, J., concurring).

Courts must always be extremely careful in resolving jurisdictional questions because such cases allow them to expand or aggrandize the scope of their own powers, often at the expense of other branches of government. *See Taylor v. Beckham*, 178 U.S. 548, 580, 20 S.Ct. 890, 902, 44 L.Ed. 1187 (1900) ("This tribunal, therefore, should be last to overstep the boundaries which limit its own jurisdiction."). The gravity of such rulings is further enhanced by the fact that, as the Supreme Court has recognized since time immemorial, the Constitution accords Congress the exclusive power to determine the scope of district and circuit court jurisdiction.

> [H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies [in Article III]. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

Sheldon v. Sill, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850).

Jurisdictional questions are of particular importance because they directly implicate the efficacy of Congress's attempts to regulate the lower courts. Jurisdictional statutes are among the most important checks and balances the Framers integrated into the tripartite structure of the federal government. Broad interpretations of jurisdictional grants undermine the regulatory role Congress plays over the jurisdiction of most Article III courts, thereby effectively reducing the scope of Congress's power to "check" the judiciary while expanding the scope of the courts' power.

8. *This ruling will have wide-ranging implications in other areas of the law that could lead to tremendous practical problems*—My discussion up until this point has been limited to the immediate effects of § 1367 on diversity-based class actions. It is clear, however, that the impact of nearly any holding on this issue will reverberate far beyond class action cases to affect a wide range of other matters, as well.

Historically, in non-class-action suits, the Supreme Court has enforced a "complete diversity" rule, requiring each named plaintiff to satisfy both the diversity-of-citizenship and amount-in-controversy requirements of § 1332. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267, 2 L.Ed. 435 (1806) (concluding that, under the federal diversity, "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts"). If courts may exercise supplemental jurisdiction over unnamed plaintiffs in class action suits who fail to satisfy § 1332's requirements, there does not seem to be any reason why courts would not also be able to exercise supplemental jurisdiction over named plaintiffs in "normal" (non-class-action) suits who fail to meet these requirements, as well. Put another way, there is no principled basis for limiting the panel's holding to only class action suits. *See*

Ren-Dan Farms v. Monsanto Co., 952 F.Supp. 370, 376 (W.D.La.1997) ("Defendants' proposed rule could lead to a finding of federal jurisdiction for an entire multi-party action where diversity only existed between two parties.").

Under the panel's interpretation of § 1367, only one plaintiff per diversity-based lawsuit—whether or not it is a class action—would have to meet § 1332's amount-in-controversy and diversity-of-citizenship requirements for a federal court to exercise supplemental jurisdiction over everyone else's claims. All the other plaintiffs in that suit, whether named or unnamed, could not only reside in the same state as the defendant, but have minuscule claims that come nowhere near 1332's amount-in-controversy requirement. "[P]laintiffs without an independent ticket of entry to federal court should not be able to get into federal court by 'piggybacking' onto other claims which do satisfy the jurisdictional requirements." *Leung*, 1993 WL 515470, at *2, 1993 U.S. Dist. LEXIS 17174, at *5. Thus, the supplemental jurisdiction question necessarily affects all diversity-based multiparty litigation.

Another area of the law that could potentially be dramatically affected by this holding is removal jurisprudence. A case filed in state court may be removed to federal court only if the federal court would have had jurisdiction over it had the plaintiff originally filed it there. *See Triggs v. John Crump Toyota*, 154 F.3d 1284, 1287 (11th Cir.1998) ("A civil case filed in state court may be removed by the defendant to federal court if the case could have been brought originally in federal court."). Under the panel's interpretation of § 1367, a significant number of cases that would not have been removable to federal court, due to the involvement of parties who did not satisfy § 1332's requirements, may now be removed. Indeed, the importance of our fraudulent joinder jurisprudence would also be greatly reduced, *see id.* (describing various doctrines for fraudulent joinder), since district

courts would likely be able to exercise supplemental jurisdiction over a significant number of parties whose involvement in a case would otherwise have defeated federal jurisdiction.

For these reasons, it is a mistake to believe that the impact of this § 1367 controversy is limited to diversity-based class actions; it will necessarily lead to potentially tremendous effects in all multiparty diversity cases as well as our removal jurisprudence.[25]

In short, the question of supplemental jurisdiction in diversity-based class actions is of sufficient importance to warrant a grant of certiorari due to: the jurisdictional nature of the issue, its potential impact on the relationship between state and federal courts, the questions concerning statutory interpretation it raises, the number of people affected, the large amounts of money typically involved in such cases, the potential reduction in the caseload of the federal courts that could result, the implications for separation of powers involved, and its likely effects far beyond the realm of class actions.

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[25] Even if (as I believe) *Zahn* remains good law under § 1367, and courts may not exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions, we are still left with troubling questions in non-class-action multiparty suits. It is possible, for example, that a plaintiff might be able to attempt to evade a limitation on supplemental jurisdiction in class actions by simply including all the members of the putative class in the complaint as named plaintiffs. If, outside the class-action context, § 1367 abrogates the *Strawbridge* complete diversity rule (discussed above), then only one plaintiff would have to meet § 1332's diversity-of-citizenship and amount-in-controversy requirements for the district court to exercise supplemental jurisdiction over everyone else. It is unclear whether parties should be able to circumvent constraints on supplemental jurisdiction through such procedural machinations (perhaps another reason to be somewhat skeptical of a plain-text, literal approach to § 1367).

D. *The Supreme Court Should Grant Certiorari Because of the Particular Need for Uniformity on the Supplemental Jurisdiction Question*

Another factor of particular significance to the Court in deciding whether to grant certiorari—closely related to the "importance" of an issue—is whether there is a particular need for nationwide uniformity. *See* Bishop & Sarles, *supra* at 20 (noting that certiorari is more likely to be granted if "the issue is one where uniformity counts—that the conflict is going to be difficult to live with"); Sturley, *supra* at 1255 ("Because the Court generally resolved conflicts to maintain uniformity in federal law, resolving conflicts is less important in fields where uniformity is relatively unimportant—regardless of how important (in the abstract sense) the underlying issues may be."). This Section demonstrates that there exist convincing reasons for the Court to establish a definitive, uniform interpretation of § 1367.

1. *The need to eliminate forum-shopping*—Perhaps one of the most basic reasons why it is particularly important to establish a uniform interpretation of § 1367 is to prevent forum-shopping by opportunistic plaintiffs. "[A]n intolerable conflict occurs when litigants are able to exploit conflicts affirmatively through forum shopping. . . ." Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 *N.Y.U. L.Rev.* 681, 725 (1984); *see also* Sturley, *supra* at 1256 ("[F]orum-shopping risks and planning concerns may accelerate the need for the Supreme Court to decide an issue"). Since *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (interpreting the Rules of Decision Act as mandating that state judicial opinions be recognized as binding law by federal courts hearing diversity cases), the Supreme Court has been careful to interpret diversity-related laws with two goals in mind: "discouragement of forum-shopping and avoidance of inequitable administration of the

laws." *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 1142, 14 L.Ed.2d 8 (1965).

Forum-shopping is of particular concern in nationwide class action suits, where plaintiffs' attorneys can essentially cherry-pick whom they wish to make a named plaintiff and decide for themselves the district and circuit in which to file suit. In most cases, it will typically be a relatively trivial matter to sue in a circuit that permits the exercise of supplemental jurisdiction over unnamed plaintiffs who fail to satisfy § 1332's amount-in-controversy requirement. This is precisely the type of outcome-determinative forum-shopping the Court has long combated.

As the law stands today, the question of whether or not a district court will exercise jurisdiction over unnamed plaintiffs in a diversity-based class action depends less on the proper interpretation of § 1367 than it does on the place where an attorney decides to sue. The scope of a district court's power should not depend on the circuit in which it is located. Only a definitive ruling of the Supreme Court establishing a uniform, nationwide determination of the district courts' jurisdiction can prevent attorneys from gaming the system like this.

2. *The need to enforce important rights established by a federal statute consistently*—Another reason why uniformity is of particular importance in this case is because it involves interpretation of an important right guaranteed by a federal statute—the right to be heard in a federal court. "[S]urely it is hard to dispute that, in a country with a national government such as ours, Congress should not be held to have laid down one rule in North Carolina and another rule in North Dakota simply because the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit disagree with one another on the meaning of a federal statute." William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 *Fla. St. U.L.Rev.* 1, 11-12 (1986). As a

result of concerns over disparate interpretations of the scope of federal rights, "[o]ne of the Court's duties is to do its best to see that federal law is not being applied differently in the various circuits around the country." *Taylor v. United States*, 504 U.S. 991, 991, 112 S.Ct. 2982, 2982, 119 L.Ed.2d 599 (1992) (White, J., dissenting); *see also Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1017, 99 S.Ct. 626, 628, 58 L.Ed.2d 687 (1978) (White, J., dissenting from denial of certiorari) ("Is the federal law, statutory or constitutional, being interpreted and enforced differently in different sections of the country? This has been an important criterion for the exercise of the Court's powers since most of the Court's jurisdiction was made discretionary in 1925.").

The right to be heard in court is an important civil right. Differing interpretations of § 1367 means that the right of citizens (acting as unnamed plaintiffs) to have a federal court adjudicate their claims depends on the judicial district in which suit is filed. Given both the general importance of establishing consistent interpretations of rights guaranteed by federal statutes, as well as the specific importance of the right of access to federal courts in particular, the Court should step in to eliminate the morass of conflicting interpretations of § 1367.

E. *The Supreme Court Should Grant Certiorari to Protect the Integrity of its Decision Making*

An additional reason the Court should step in is because this case implicates the integrity of the Court's ruling in *Zahn v. International Paper*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed. 2d 511 (1973). As discussed in Part I, the *Zahn* Court, building on *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969), determined that while unnamed plaintiffs are excused from § 1332's diversity-of-citizenship requirement, they are nonetheless required to satisfy its amount-in-controversy requirement. Several circuits have held that, by enacting § 1367, Congress legislatively overruled this deci-

sion. It bears repeating that § 1367 does not specifically address diversity-based class actions, and the legislative history is not only silent as to any intent to overrule *Zahn*, but unambiguously and explicitly declares that Congress intended to *preserve* that decision, *see infra* Section III.C.

In a hierarchical court system such as ours, we should always be somewhat skeptical when a lower court decides that it need no longer follow a decision of the United States Supreme Court because that decision has been overruled by general, broad statutory language. *Cf. Hubbard v. United States*, 514 U.S. 695, 713 n. 13, 115 S.Ct. 1754, 1764 n. 13, 131 L.Ed.2d 779 (1995) ("We would have thought it self evident that the lower courts must adhere to our precedents."); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 (1983) ("[O]nly this Court may overrule one of its precedents."); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). This is not a case where specific statutory language that had previously been interpreted by the Court is amended; instead, we are dealing with the degree to which a new federal statute should be read as implicitly nullifying the Court's rulings in the field of supplemental jurisdiction—an area that, for almost two centuries, has been within the exclusive province of the Court's discretion with no legislative guidance.[26] This is a judgment best made by the Supreme Court.

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[26] The Court's first supplemental jurisdiction ruling was arguably *Osborn v. President, Directors, & Co. of the Bank of the United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824).

F. *The Court's Prior History With § 1367*

A final factor demonstrating that the supplemental jurisdiction question is worthy of the Supreme Court's attention is the fact that the Court previously granted certiorari on this issue. In *Free v. Abbott Labs.*, 529 U.S. 333, 120 S.Ct. 1578, 146 L.Ed.2d 306 (2000), the Court granted certiorari to review the Fifth Circuit's en banc holding that § 1367 overruled *Zahn* and allowed courts to exercise supplemental jurisdiction over unnamed ¡ 'aintiffs in diversity-based class actions, *see Free v. Abbott Labs.*, 176 F.3d 298 (5th Cir.1999) (en banc).

Justice O'Connor recused from the case, however, and the Fifth Circuit's ruling was affirmed by an equally divided Court in a per curiam opinion that did not contain any reasoning or explanation. Such a disposition has no precedential effect, and so was insufficient to resolve this contentious issue. *See Rutledge v. United States*, 517 U.S. 292, 304, 116 S.Ct. 1241, 1249, 134 L.Ed.2d 419 (1996) ("[A]n unexplained affirmance by an equally divided court [is] a judgment not entitled to precedential weight no matter what reasoning may have supported it.").

In the four years since *Free*, the depth of the controversy over § 1367 and the number of people it is adversely affecting has only grown. If the issue was worthy of the Court's attention in 1999, it is only more so today.

G. *No Substantial Factors Counsel Against Granting Certiorari in This Case*

It is possible for an otherwise "cert-worthy" case to have certain features that will cause the Court to overlook it. For example,

> [a] conflict will not necessarily result in the grant of certiorari if the issue is no longer a live one. . . . A conflict with a decision that has been discredited or that has lost all weight as authority by reasoning of inter-

> vening decisions of the Supreme Court or other courts of appeals . . . will not be an adequate basis for granting certiorari. . . . If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review. . . . If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied. . . . A related reason for denying certiorari is that the case at hand does not fairly present the legal question over which there is a conflict.

Stern, *supra* at 230-31. None of these factors are present in this case. As discussed earlier, *see* Section II.A, the split among the circuits is quite "live." Since § 1367 was enacted less than a decade and a half ago, none of the circuits' rulings are antiquated or in serious danger of being reversed. Similarly, because § 1367 involves a threshold jurisdictional issue, it is impossible for the Court to dispose of this case on an alternate ground without resolving this question; for the same reason, disposition of this issue can hardly be deemed "irrelevant" to the ultimate outcome of this case.

Justice Harlan enumerated some other factors that may cause the Court to deny certiorari:

> [E]ven where a "true" conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing legal consequences, as where a statute which has given rise to conflicting interpretations has been repealed or amended.

Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 *Austl. L.J.* 108

(1959).[27] Again, these concerns are inapplicable here. Given the deep and abiding schism that has persisted for over a decade among district and circuit courts, it is unlikely that they will simply work it out among themselves in the absence of guidance from the Supreme Court. Moreover, § 1367 is still very much alive and well; this case is not about an academic disagreement over an irrelevant or moribund statute.

There are two concerns that warrant extended discussion, however. Subsection 1 argues that this issue does not require further "percolation" within lower courts before being addressed by the Supreme Court. Subsection 2 demonstrates that the supplemental jurisdiction matter is a general question of law and statutory interpretation rather than simply a fact-bound dispute.

1. *There is no need to allow this question to percolate in district and circuit courts any longer*—The Supreme Court will sometimes allow a circuit split to persist in order to allow an issue to further "percolate" in the lower courts. It is thought that "independent evaluation of a legal issue by different courts . . . allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule." Estreicher & Sexton, *supra* at 716; *see also* Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the*

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[27] Another author has enumerated the following factors as precluding certiorari:

> (1) the presence of a spurious federal question, (2) the presence of a patently absurd question, (3) a request that the Supreme Court review a lower court's factual determination, and (4) a request that the Supreme Court review the sufficiency of the evidence upon which a judgment in the lower court was based.

Smith, *supra* at 756-57. As this opinion has attempted to demonstrate, the § 1367 issue is neither "spurious" nor "absurd." Moreover, as Subsection II.G.2 demonstrates, this is not a fact-bound issue unlikely to extend beyond the confines of this case.

Regional Design of the U.S. Courts of Appeals, 56 *U. Chi. L.Rev.* 603, 633 (1989) ("[I]t is important that the Supreme Court have the benefit of as much thinking on the question as is feasible before it makes this final resolution."). Whatever the general value of percolation for instant coffee or certain legal issues, it seems to be of no further importance in this case. *Cf.* Rehnquist, *Changing Role of the Supreme Court, supra* at 11 ("If we were talking about laboratory cultures or seedlings, the concept of issues 'percolating' in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live.").

As discussed earlier, eight courts of appeals, dozens of district courts, and scores of commentators and learned treatises have already spoken on this question and are no closer to reaching a consensus than they were over a decade ago when the question first arose. It seems that the arguments to be made on both sides of the issue have been forcefully and persuasively elucidated. Given the fact that the issue has already been simmering for well over a decade, there is little to be gained by allowing lower courts to continue issuing contradictory rulings.

Indeed, it is quite unlikely that there is some "hidden truth" about § 1367's true meaning hovering in the ether just waiting to be grasped by some unusually insightful district judge or appellate panel. Academic commentary is virtually unanimous that § 1367 is, to put it gently, a hopeless mess. The statute has been called "hurriedly conceived and poorly drafted." Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 *Ind. L.J.* 181, 185 (1998). Richard Freer has argued that it "is poorly drafted and creates unnecessary confusion, even for situations as to which the rules had been clear and consistent." Richard D. Freer, *Compounding Confusion and Hampering Diversity:*

Life After Finley and the Supplemental Jurisdiction Statute, 40 *Emory L.J.* 445, 446 (1991). Erwin Chemerinsky has opined that the statute "might be the result of unintended oversights or even a bit of sloppy drafting." Erwin Chemerinsky, *Perspectives on Supplemental Jurisdiction: Rationalizing Jurisdiction*, 41 *Emory L.J.* 3, 11 (1992). Things have degenerated to the point where "criticism [of § 1367] has become something of a cottage industry. It has ranged from attacks upon the good faith of the drafters to bad policy choices through misreading of precedents and sloppy drafting." Arthur D. Wolf, *Comment on the Supplemental-Jurisdiction Statute*, 74 *Ind. L.J.* 223, 231 (1998). In light of this virtually unanimous chorus of condemnation, it seems clear that the underlying problem is not with either the quantity or quality of judicial interpretations of § 1367, but with § 1367 itself. When a statute causes such confusion, there is little value in making lower courts grope about blindly for their best guess as to what it means, or what Congress may have intended.

Nevertheless, even if there *is* one "correct" interpretation of the statute, it can probably be found in the thousands of pages of court rulings and academic commentary that have already accumulated. Given the wide range of views and arguments (not to mention entire law review issues) that have already been put forth on this subject, it is quite likely that "the truth is out there." The Court should not defer adjudicating this issue on the basis that the best arguments have yet to be made. *See* Estreicher & Sexton, *supra* at 725 ("The Court should halt the percolation process . . . when the benefits to be derived from definitively resolving the conflict outweigh the benefits of further percolation."); Saul Brenner, *Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies*, 92 *Law Libr. J.* 193, 200 (noting that, according to one study, the Supreme Court typically grants certiorari where "there is no need or desire for more 'percolation' (or more extensive consideration) of

the issue by the lower courts or by others") (citing Perry, *supra* at 278). This is hardly a "novel question," and the sheer magnitude of existing precedent eliminates any fear that "premature resolution" of the issue will "stunt[ ] the natural growth and refinement of alternative principles." *California v. Carney*, 471 U.S. 386, 399, 105 S.Ct. 2066, 2073, 85 L.Ed.2d 406 (1985) (Stevens, J., dissenting).

"From a management perspective, it is useful to permit issues to 'percolate' through the system for a time, taking them at the Supreme Court level only when it is evident both that uniformity is required and that lower tribunals will not themselves reach that outcome, without guidance from above." Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 *Colum. L.Rev.* 1093, 1109 (1987). Section 1367 is admittedly not quite the indecipherable inkblot or unintelligible Sanskrit that certain parts of the Constitution have been called. *See, e.g.*, Robert Bork, *The Tempting of America* 166 (1991). Nevertheless, as an empirical matter (whatever one may think about the clarity of the statute in the abstract), we are at the point where well-meaning judges are simply taking their best stabs at the language of § 1367 and coming to different conclusions. In many cases, judges are simply deploying contradictory canons of statutory interpretation and arriving at vastly disparate results. We do not need additional answers to this question from the lower courts—nor, to be frank, do we even need the *right* answer (though that would obviously be desirable)—but we simply need *an* answer. *See* Rehnquist, *Changing Role of the Supreme Court, supra* at 11 ("What we need is not the 'correct' answer in the philosophical or mathematical sense, but the 'definitive' answer, and the 'definitive' answer can be given under our system only by the court of last resort."). It is precisely because "Justices like the smell of well-percolated cases," Perry, *supra* at 230, that "[a]fter ten years of percolation, it is time for the [Court] to

smell the coffee." *Johnson v. United States R.R. Retirement Bd.*, 969 F.2d 1082, 1093 (D.C.Cir.1992).

2. *This is not a fact-bound dispute*—Another major reason why the Court will frequently deny certiorari in a case is if the legal dispute is fact-bound—that is, if it arises primarily from a unique constellation of facts unlikely to frequently arise again. "The Court's job is to make law. . . . [Lower courts] cannot be brought into line by a Supreme Court decision that turns exclusively on the facts of one particular case. . . . [T]he Court prefers to take cases in which the facts are simple and clear and the legal issue is presented crisply." Stewart A. Baker, *Symposium on Supreme Court Advocacy: A Practical Guide to Certiorari*, 33 *Cath. U.L.Rev.* 611, 616 (1984); Levinson, *supra* at 726 (noting that some certiorari petitions "are likely to be denied because they are essentially fact-bound").

The question of whether § 1367 permits courts to exercise supplemental jurisdiction over unnamed plaintiffs in diversity-based class actions is a pure question of law. It can be resolved without regard to the specific facts of this case, and, as demonstrated earlier, *see supra* Subsections II.C.4, II.C.6, will impact a large number of people and cases far beyond the instant matter.

In conclusion, there are a variety of compelling reasons why the Court should grant certiorari in this case, including: the necessity of mending the interpretive chasm that has persisted in the federal judiciary for close to fifteen years, the objective importance of this issue, the critical need for a uniform interpretation of § 1367 across jurisdictions, and protecting the integrity of the Court's decisionmaking. Moreover, the Court's willingness to grant certiorari in *Free* is itself further evidence that this issue warrants its attention. In light of these considerations, I respectfully urge the Court to resolve this contentious matter.

III. Section 1367 Does Not Permit Courts to Exercise Supplemental Jurisdiction Over Unnamed Plaintiffs in Diversity-Based Class Actions

Throughout this opinion, I have been careful to avoid referring to the underlying merits of the supplemental jurisdiction issue because the Court does not grant certiorari merely to correct lower courts' errors.

> [T]he Court's statement in Rule 10 suggests that the Court does not perceive its function as correcting legal error in individual cases; rather, the Court has indicated that it intended to, and functions to, determine important issues of federal law, ensure compliance with Supreme Court precedents, ensure federal supremacy, and resolve conflicts between lower courts concerning federal questions.

Smith, *supra* at 743. As Justice Harlan emphasized, "The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari, nor, for that matter, is the fact a case may have been rightly decided in itself enough to preclude certiorari." Justice Harlan, *Manning the Dikes*, 13 *Rec. N.Y.C. Bar Ass'n* 541, 551 (1958); *see also Ross v. Moffitt*, 417 U.S. 600, 617, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (Rehnquist, C.J.) (noting that a grant of certiorari "depends on numerous factors other than the perceived correctness of the judgment [the Court is] asked to review").

Nevertheless, should the Court grant certiorari in this case for the reasons articulated in Part II, it will have to come to a conclusion concerning the merits of this case. This Part briefly sets forth the reasons why I feel the panel below interpreted § 1367 incorrectly. A close reading of the statutory language demonstrates that supplemental jurisdiction is not available in diversity-based class actions. Moreover, even if one disputes my plain-meaning approach to these

provisions, my arguments reveal that the statute is sufficiently unclear to justify turning to the legislative history, which clearly and unambiguously demonstrates Congress's intent that *Zahn* remain good law. Congress did not wish to open the floodgates to an unbridled barrage of state-law litigation in federal court.

A. *The Meaning of § 1367(a)*

Section 1367(a) provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367. According to the clear language of this provision, supplemental jurisdiction may be invoked only in a "civil action of which the district court[ ] ha[s] original jurisdiction." *Id.* This phrase suggests that a party may not invoke supplemental jurisdiction under § 1367(a) unless the court already has original jurisdiction over each of the claims comprising that action.[28]

Under this understanding of the phrase, a district court can never exercise supplemental jurisdiction over unnamed

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[28] Of course, this is arguably an absurd interpretation of the statute because it would permit courts to exercise supplemental jurisdiction only in cases where it didn't need to, since some other form of jurisdiction exists over each of the claims in the complaint. It is precisely because a plain-text interpretation leads to such a bizarre that it is appropriate for us to refer to the legislative history to ascertain Congress's true intent.

plaintiffs pursuing state-law claims who fail to meet § 1332's amount-in-controversy requirement. The involvement of such unnamed class members precludes the court from having original jurisdiction over the whole civil action, which is a prerequisite for exercising supplemental jurisdiction. Consequently, while the court may have original jurisdiction over particular claims *within* that class action (specifically, the claims of plaintiffs who satisfy both of § 1332's jurisdictional requirements), it cannot exercise original jurisdiction over the civil action *as a whole* until the class members who fall beneath § 1332's amount-in-controversy requirement are dismissed from the case.

Some courts have held that the requirement of § 1367(a) is satisfied so long as the court has original jurisdiction over *any* of the claims specified in the complaint. However, a subsequent portion of § 1367(a) refers to particular "claims in the [civil] action" over which the court has original jurisdiction. When Congress wanted to refer to individual claims in a complaint, it knew how to do so; when Congress wanted to refer to the civil action as a whole (encompassing *all* the claims in the complaint), it apparently knew how to do so, as well.

At the very least, it is unclear whether my interpretation of the phrase "civil action of which the district court[ ] ha[s] original jurisdiction" or the interpretation implicitly adopted by the district court in the instant case is correct. This ambiguity requires us to turn to the legislative history to see if Congress intended that supplemental jurisdiction be available in diversity-based class actions.

The District Court for the Eastern District of California has cast another portion of § 1367(a) into question. Under § 1367(a), a person may invoke supplemental jurisdiction over a claim only if it is so related to the claims over which the court already has original jurisdiction that they form part of the "same case or controversy under Article III of the

United States Constitution." 28 U.S.C. § 1367(a). In *Snider v. Stimson Lumber Co.*, the court held:

> [A] class action involving separate and distinct claims by definition involves several or distinct rights. Class members can litigate these claims together, not because they are one case or controversy, but simply because the different claims [involve] common questions of law or fact. Accordingly, when class members assert separate and distinct claims, there are as many "cases or controversies" in a class action as there are class members. Simply put, claims related to those asserted by other class members may suffice to support recognition of a class, but that does not mean they form part of the same case or controversy under Article III of the United States Constitution within the meaning of 28 U.S.C. § 1367.

914 F.Supp. 388, 391 (E.D.Cal.1996) (second brackets in original; internal quotations and citations omitted).

While I do not agree entirely with this reasoning, it does cause me to question whether claims by unnamed class members necessarily form part of the "same case or controversy under Article III of the United States Constitution" as that presented by the named plaintiffs who satisfy § 1332's requirements. Some courts have held that this phrase simply requires that the class members' claims satisfy the *Gibbs* test; that is, they form part of the same constitutional "case or controversy" so long as they arise out of the same common nucleus of operative facts.[29] However, the equally plausible interpretation the district court gave this provision in *Snider*—along with confusion over § 1367(a)'s requirement that a court have original jurisdiction over a civil action—renders the true meaning of § 1367(a) sufficiently

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[29] *Gibbs* involved pendent state-law claims in a federal question case; the Court's opinion offers guidance in determining when such claims fall within the boundaries of a "case."

ambiguous as to warrant resort to the legislative history in order to ascertain whether Congress wanted it to apply to class actions.

B. *The meaning of § 1367(b)*

28 U.S.C. § 1367(b) states:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

The panel opinion and the majority of circuits read the exceptions in § 1367(b) as forming an exclusive list. These courts argue that when a claim satisfying the requirements of § 1367(a) is joined to a case under a particular Federal Rule of Civil Procedure, a district court may exercise supplemental jurisdiction over that claim unless the Rule under which it is joined is expressly listed in § 1367(b). Since Rule 23 (the class action rule) is not in this list of exceptions to supplemental jurisdiction, courts are empowered to exercise supplemental jurisdiction over unnamed plaintiffs in such cases. *Allapattah*, 333 F.3d at 1255-56 ("The fact that Congress created explicit exceptions to § 1367(a)'s broad grant of supplemental jurisdiction but did not include Rule 23 among them leads us to conclude that it did not intend to prevent district courts from exercising supplemental jurisdiction over the claims of class members.").

There is nothing in the text of the statute, however, which indicates that the Rules mentioned in § 1367(b) were meant to constitute an exclusive list. Congress could easily have written the statute to specify that the Rules it mentioned are the "only" Rules under which supplemental jurisdiction is prohibited; it chose not to do so, however. The argument in the *Allapattah* panel's opinion is implicitly based upon the *expressio unius* canon of statutory construction.

I do not feel *expressio unius* is appropriate here. As the Supreme Court has repeatedly held, "The maxim expressio unius est exclusio alterius is an aid to construction, not a rule of law. It can never override clear and contrary evidences of Congressional intent." *Neuberger*, 311 U.S. at 88, 61 S.Ct. at 101; *see also Barnhart*, 537 U.S. at 168, 123 S.Ct. at 748 ("We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."). The legislative history in this case provides clear evidence that Congress did not wish to overrule the holding in *Zahn* by allowing courts to extend supplemental jurisdiction to unnamed class members who failed to meet § 1332's amount-in-controversy requirement.[30]

Judge Pollak of the Eastern District of Pennsylvania pointed out a second way in which § 1367(b) is ambiguous. Like me, he questions "the assumption that the absence of a phrase—'Rule 23'—from a statute signifies conclusively that Congress intended that the phrase not be there." *Russ v. State*

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[30] As discussed above, the restrictions on supplemental jurisdiction contained in § 1367 pertain to people made parties to a lawsuit under certain specified rules of civil procedure. A troubling question concerning § 1367(b) is whether a plaintiff may be able to evade many of these restrictions by simply including such people in the original complaint (or in an amended complaint), rather than making them parties through the specified rules. I am dubious that jurisdictional restrictions could be circumvented through such procedural ploys.

Farm Mut. Auto. Ins. Co., 961 F.Supp. 808, 819 (E.D. Pa.1997). Judge Pollak points out that § 1367(b) contains references to various Rules of Civil Procedure. "[T]he text of [§ 1367(b)] is cast in a form—references by number to various Federal Rules of Civil Procedure--that makes that text, read in isolation, almost impenetrable to any audience other than specialists in civil procedure in the federal courts." *Id.* He argues that these references make it unlikely that most members of Congress would have understood, from the plain text of § 1367(b) alone, exactly what it is they were voting on.

> It is hard to believe that, in the Congress which enacted section 1367, there were any members other than the four who were also members of the Federal Courts Study Committee . . . who, in order to understand section 1367, would have looked to the words of the statute unless they were not furnished any extrinsic aid to understanding.

Id. He notes that "such extrinsic aid was at hand in the form of the House Judiciary Committee Report on H.R. 5381—a report whose detailed section-by-section analysis was made available to the Senate as well as to the House." *Id.*

Pollak's premise is indisputable—to understand § 1367(b), it is absolutely necessary to proceed beyond the four corners of the statute. It seems eminently reasonable to assume that, when forced to go beyond the statute itself to decipher its meaning, Members of Congress consulted the House Committee Report rather than to the actual Rules of Civil Procedure. Judge Pollak advocates that we use the same process to understand the meaning of § 1367(b) as the Members of Congress who enacted the statute used. Thus, another reason for turning to the legislative history is not so much because the statute is "ambiguous" as that word is customarily used, but, instead, because the statute does not

fully explain itself. We must go beyond the statute to understand the implications of its various cross-references.

C. *Legislative History*

In light of the reasons discussed throughout the preceding two sections, we should turn to the legislative history to determine whether supplemental jurisdiction under § 1367 is available for unnamed plaintiffs. It is also worth noting that the Third Circuit did not even depend on the existence of an ambiguity to justify its resort to legislative history. It held,

> Even were we to conclude that Section 1367 is unambiguous, as *Abbott Laboratories* read it, we would nevertheless turn to the legislative history because this is one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."

Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir.1999) (brackets in original) (*quoting United States v. Sherman*, 150 F.3d 306, 313 (3d Cir.1998)). As Judge Pollak further pointed out, to exercise supplemental jurisdiction over such claims

> is to say to Congress: "We know what you meant to say, but you didn't quite say it. So the message from us in the judicial branch to you in the legislative branch is: 'Gotcha! And better luck next time.'" Such a message is not required by the separation of powers. Nor is it in harmony with the fact that Congress and the courts, however different their respective roles, are parts of a single government.

Russ v. State Farm. Mut. Auto. Ins. Co., 961 F.Supp. 808, 820 (E.D.Pa.1997).

An examination of the legislative history reveals that Congress had no intention of either overruling *Zahn* or opening the doors of the federal courthouse to hundreds—perhaps

thousands—of unnamed plaintiffs with minuscule state-law claims piggybacking on the claim of a named plaintiff who happens to satisfy § 1332's amount-in-controversy requirement. On the floor of both the House and Senate, the bill containing § 1367 was consistently referred to by its sponsors as "noncontroversial." 136 *Cong. Rec.* S17578 (Oct. 27, 1990) (statement of Senator Grassley); *id.* at H13313 (Oct. 27, 1990) (statement of Congressman Kastenmeier). Senator Grassley claimed that the bill would not "represent major changes in the law." *Id.* at S17578. These assertions on the floor of Congress strongly suggest that § 1367 did not overturn the Supreme Court's holding in *Zahn*, undermine a firm understanding of diversity jurisdiction dating back to the 1800's, or open the doors of the federal courthouse to scores of small claims that would otherwise be in state court.

House Report No. 101-734 from the House Judiciary Committee was the only report addressing § 1367 produced by Congress; because the Senate adopted the report for its own use, it reflects the understanding of both houses of Congress. *See H. Rep.* No. 101-734 (Sept. 21, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6860; *see also* 136 Cong. Rec. S17580-81 (daily ed. Oct. 27, 1990) (adopting the House report for the Senate's use). The Supreme Court has declared, "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which '[represent] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76, 105 S.Ct. 479, 483, 83 L.Ed.2d 472 (1984). Particularly because both houses of Congress relied on this report, we should accord it significant weight.

The committee report explained that it was intended to overrule the Supreme Court's holding in *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). It stated that § 1367

> would authorize jurisdiction in a case like *Finley* as well as essentially restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental jurisdiction. . . . In providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley v. United States*. *H. Rep.* No. 101-734, at 28-29, *reprinted in* 1990 U.S.C.C.A.N. at 6874-75. This pre-*Finley* understanding of supplemental jurisdiction, of course, includes *Zahn*. Far from criticizing *Zahn*, this report evidences Congress's intent to reinstate pendent party jurisdiction (in federal question cases brought under 28 U.S.C. § 1331), not to allow unnamed plaintiffs (in diversity cases brought under 28 U.S.C. § 1332) to deluge federal courts with minor claims.

The report goes on to state that, under § 1367, "In diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute." *Id.* at 28, 1990 U.S.C.C.A.N. at 6874. Of course, the Supreme Court's holding in *Zahn* was an interpretation of the diversity statute; allowing supplemental jurisdiction over unnamed plaintiffs despite *Zahn*'s prohibition would necessarily be "inconsistent with the jurisdictional requirements of the diversity statute."

Perhaps most importantly, the report expressly explains that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions as those requirements were interpreted prior to *Finley*." *Id.* at 29, 1990 U.S.C.C.A.N. at 6875. This sentence ended with a footnote, *id.* at 28 n. 14, 1990 U.S.C.C.A.N. at 2874, that cites the Supreme Court's holdings in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673

(1921), and *Zahn v. International Paper, Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). Thus, the committee report that was relied upon by both the House and the Senate expressly declares that § 1367 was not intended to overrule *Zahn*. The legislative history unambiguously demonstrates that § 1367 was not intended to affect the applicability of § 1332's amount-in-controversy requirement in class action suits. Particularly given the weight to which the Supreme Court accords committee reports, we are not at liberty to overlook this clear expression of congressional intent.

IV. Conclusion

For these reasons, I believe the panel erred in allowing courts to exercise supplemental jurisdiction under § 1367 over the claims of unnamed plaintiffs in diversity-based class actions who fail to meet § 1332's amount-in-controversy requirement. In light of the deep and abiding schism that has divided the federal judiciary for a decade and a half since the very enactment of this law, as well as the wide-ranging importance of this issue, the Supreme Court should grant certiorari.

APPENDIX B

UNITED STATES COURT OFAPPEALS,
ELEVENTH CIRCUIT

Nos. 01-15575, 01-16244

ALLAPATTAH SERVICES, INCORPORATED, a Florida corporation, ROBERT LEWIS, INC., a Florida corporation, d.b.a. TRIAL EXXON, G.G.S.K.1, INC., a Florida corporation, d.b.a. NORTH STUART EXXON, G.G.S.K., INC., *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

ROY PAGE, GLEBE ROAD EXXON, INCORPORATED,

Plaintiffs,

v.

EXXON CORPORATION, a New Jersey corporation,

Defendant-Appellant, Cross-Appellee.

ALLAPATTAH SERVICES, INCORPORATED, a Florida corporation, ROBERT LEWIS, INC., a Florida corporation, d.b.a. NORTHLAKE EXXON, d.b.a. TRIAL EXXON, G.G.S.K.1, INC., a Florida corporation, d.b.a. NORTH STUART EXXON, G.G.S.K., INC., *et al.*,

Plaintiffs-Appellees,

ROY PAGE, *et al.*,

Plaintiffs,

v.

EXXON CORPORATION, a New Jersey corporation,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida.

June 11, 2003

Before WILSON and FAY, *Circuit Judges*, and GOLDBERG,* *Judge*.

WILSON, *Circuit Judge*:

This case arises out of a class action suit filed by approximately 10,000 Exxon dealers who alleged that Exxon Corp. breached its dealer agreements by overcharging them for fuel purchases. Following a second trial, a jury returned a special verdict in favor of the dealers. After entering a final judgment for the class representatives and denying the dealers' motion for the entry of a class-wide judgment, the district court certified the following two questions for interlocutory appeal: (1) whether it properly exercised supplemental jurisdiction over class members whose claims did not meet the jurisdictional minimum amount in controversy requirement; and (2) whether an aggregate compensatory and prejudgment interest award could be entered for the class before the claims administration process. Additionally, the court urged us to consider all of the legal issues raised by both parties relating to the disposition of the case. Thus, we also consider (1) whether Exxon is entitled to participate in the claims administration process; (2) whether Exxon may assert set-off claims against the dealers; (3) whether the district court abused its discretion by certifying the class; (4) whether the court erred when it admitted extrinsic evidence to supplement the Dealer Sales Agreements (dealer agreements); (5) whether the dealers'

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* Honorable Richard W. Goldberg, Judge, U.S. Court of International Trade, sitting by designation.

claims were barred by the statutes of limitations; and (6) whether the court abused its discretion by allowing the dealers' expert witness to testify at trial. We find no reversible error and accordingly affirm.

BACKGROUND [1]

This suit was filed by a class of approximately 10,000 current and former Exxon dealers in thirty-five states who alleged that in connection with a marketing program known as the Discount for Cash (DFC) program, Exxon systematically and intentionally overcharged them for the wholesale purchase of motor fuel between March 1, 1983 and August 31, 1994. As a result of the overcharges, the dealers alleged that Exxon breached its obligations to them under the dealer agreements.

Under the DFC program, Exxon encouraged its dealers to implement a pricing system under which retail customers who paid cash for gasoline would pay a few cents less than customers who paid with credit cards. In an effort to maximize dealer participation in the program, Exxon began charging dealers a three-percent processing fee on sales of gasoline to consumers who paid by credit card, but promised to offset the charge by reducing the wholesale price that each dealer paid for gasoline. Exxon kept this promise for approximately six months and reduced the wholesale price by 1.7 cents per gallon. In March of 1983, however, it stopped providing the offset without informing the dealers. The dealers allege that by removing the offset without informing them, Exxon was able to overcharge them for gasoline during the class period.

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[1] A detailed summary of the facts underlying the dealers' suit is set forth in *Allapattah Services, Inc. v. Exxon Corp.*, 61 F.Supp.2d 1308, 1310-13 (S.D.Fla.1999).

Upon discovering that the offset was no longer being provided, the dealers filed suit in May of 1991, and the case originally was tried to a hung jury in September of 1999. It was retried in January of 2001, resulting in a unanimous jury verdict in favor of the dealers. The jury found that Exxon breached its contractual obligations to the dealers and fraudulently concealed that breach. Following the return of the jury's verdict, Exxon filed posttrial motions for judgment as a matter of law and/or a new trial. The district court denied those motions, concluding that the evidence presented at trial was more than sufficient to support the verdict. The court further determined that, as a matter of law, the dealers were entitled to recover prejudgment interest in addition to their compensatory damages. Nevertheless, the court denied the dealers' motion for the entry of a final judgment for the class, concluding that it had no authority to enter an aggregate judgment because the jury had not awarded aggregate damages. Instead, the district court entered a final judgment for the class representatives and created an ad hoc claims process through which Exxon could contest each of the remaining class members' claims for compensatory damages.

Because the district court believed that its "order involve[d] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," it certified the case for interlocutory review pursuant to 28 U.S.C. § 1292(b), asking us to resolve the following questions: (1) whether it properly exercised supplemental jurisdiction over the claims of class members who did not meet the jurisdictional minimum amount in controversy; and (2) whether it was proper to enter judgment for the class representatives, but not for the class as a whole.

DISCUSSION

I. Supplemental Jurisdiction

The first question certified for interlocutory review by the district court was whether it had supplemental jurisdiction over the claims of all of the class members, including those who failed to meet the minimum amount in controversy requirement of 28 U.S.C. § 1332(a). "[W]hether the district court had subject matter jurisdiction over [this action] is . . . subject to *de novo* review." *Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 755 (11th Cir.2000).

The district court's question forces us to address whether 28 U.S.C. § 1367, the supplemental jurisdiction statute, overrules the United States Supreme Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291, 301, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case."[2]

Whether § 1367 overrules *Zahn* has been the subject of considerable debate among our sister circuits, which have split on the issue. *See Rosmer v. Pfizer Inc.*, 263 F.3d 110, 114 (4th Cir.2001) (holding "that § 1367 confers supple-

[2] We have raised this question before, but never answered it. In *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1080 n. 12 (11th Cir.2000), we declined to address the plaintiff's argument that § 1367 overrules *Zahn*, because "no member of the class ha[d] an individual claim that satisfie[d] the requisite amount in controversy." Shortly thereafter, in *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255, 1273-74 (11th Cir.2000), we concluded that it was premature to address the question, because the named plaintiffs had not had an opportunity to establish that their claims met the jurisdictional minimum amount in controversy. We therefore remanded the case with instructions that the district court should consider whether § 1367 overruled *Zahn* if the plaintiffs carried their burden of proof on that issue. *Id.* Since that decision, no further opportunity to address the question has presented itself until now.

mental jurisdiction in diversity class actions, so long as one named plaintiff" satisfies the minimum amount in controversy requirement), *cert. dismissed*, 536 U.S. 979, 123 S.Ct. 14, 153 L.Ed.2d 878 (2002); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 934 (9th Cir.2001) (holding the same), *cert. denied*, 534 U.S. 1104, 122 S.Ct. 903, 151 L.Ed.2d 872 (2002); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 930-31 (7th Cir.1996) (holding that § 1367 authorizes a district court to exercise supplemental jurisdiction over a party that does not satisfy the minimum amount in controversy);[3] *In re Abbott Labs.*, 51 F.3d 524, 528-29 (5th Cir.1995) (holding that as long as the class representatives meet the amount in controversy requirement, a district court may exercise supplemental jurisdiction over the members of the class who do not). *But see Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir.2000) (holding that *Zahn* remains viable and that each member of a class must meet the requisite jurisdictional amount in controversy); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 222 (3d Cir.1999) (finding the text of § 1367 ambiguous and relying upon legislative history to hold that § 1367 preserves *Zahn*); *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 640 (10th Cir.1998) (holding that § 1367 unambiguously preserves *Zahn*). Upon our own review, we agree with our sister circuits that have held that the language of § 1367 clearly and unambiguously overrules *Zahn* and allows a district court

[3] *Stromberg Metal Works, Inc.* was not a class action suit; it involved two plaintiffs, only one of whom satisfied the amount in controversy. 77 F.3d at 930. The Seventh Circuit subsequently applied *Stromberg Metal Works, Inc.* to a class action suit in *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir.1997). The Seventh Circuit held in that case that "[a]t least one named plaintiff must satisfy the jurisdictional minimum. If he does, the other named plaintiffs and the unnamed class members can, by virtue of the supplemental jurisdiction conferred on the federal district courts by 28 U.S.C. § 1367, piggyback on that plaintiff's claim." *Id.* at 607.

entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional minimum amount in controversy requirement.[4]

In addressing this question, "we begin by examining the text of the statute to determine whether its meaning is clear." *Harry v. Marchant*, 291 F.3d 767, 770 (11th Cir.2002) (en banc). "In construing a statute we must begin, and often should end as well, with the language of the statute itself." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir.1997). This is so because "'[we] must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)).

Section 1367(a) provides,

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

[4] We are unpersuaded by Exxon's argument that "[t]he 'fact that a statute has been interpreted differently by different courts is evidence that the statute is ambiguous and unclear.'" The mere existence of a split among the circuits as to the proper interpretation of § 1367 does not relieve us of our obligation to interpret the statute independently. *See Minor v. Dugger*, 864 F.2d 124, 126 (11th Cir.1989) ("Under the established federal legal system the decisions of one circuit are not binding on other circuits."); *see also Rosmer*, 263 F.3d at 118 ("[W]e cannot allow the fact that other circuits have called a statute ambiguous to negate this circuit's duty to interpret the text of the enactment.").

28 U.S.C. § 1367(a). Section 1367(b) continues,

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

Id. § 1367(b).

We believe that it is clear from the plain language of the statute that § 1367(a) is a general grant of supplemental jurisdiction, which is then narrowed for diversity cases by § 1367(b).[5] In considering whether the district court's

[5] Exxon argues that "the text and structure of § 1367[sic] preserve the jurisdictional requirement of *Zahn*." In so arguing, however, it essentially asks us to construe § 1367 in such a way as to apply only where the court already has original jurisdiction over every class members' claim. We do not believe that the statute can be read to suggest this. If a district court is required to have original jurisdiction over every class members' claim, the last sentence of § 1367(a), providing that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of *additional parties*" would be superfluous. 28 U.S.C. § 1367(a) (emphasis added). There would be little reason for the statute to provide for the exercise of claims involving the joinder of additional parties if the district court first were required to have original jurisdiction over those claims. We therefore cannot read the statute in this way. *See United States v. DBB, Inc.*, 180 F.3d 1277, 1285 (11th Cir.1999) (providing "that courts should disfavor interpretations of statutes that render language superfluous" (internal quotation marks omitted)).

Additionally, Exxon argues that the legislative history of § 1367 "confirms Congress' [sic] intent to preserve *Zahn* and prior cases." We, however, see no need to parse the legislative history to divine

exercise of supplemental jurisdiction over the dealers' claims was proper, we therefore first must determine whether the dealers satisfied the requirements of § 1367(a). The parties agree that the district court had original jurisdiction over the class representatives' claims, because they satisfied the $50,000 jurisdictional minimum amount in controversy requirement.[6] Section 1367(a) therefore authorized the court to exercise supplemental jurisdiction over those claims that were so closely related to the original claims that they "form[ed] part of the same case or controversy." *Id.* § 1367 (a). Because the dealers' claims arose from the same agreements and contractual obligations as the class representatives' claims, the requirements of § 1367(a) were satisfied.

Thus, the district court was entitled to exercise supplemental jurisdiction over the dealers' claims pursuant to § 1367(a) unless those claims fell within one of the exceptions listed in subsection (b), which explicitly prevents courts from exercising supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rule 14, 19,

congressional intent with respect to § 1367, because we consistently have reiterated that the text of a statute controls and that we may not "consider legislative history when the statutory language is unambiguous." *Valdivieso v. Atlas Air, Inc.*, 305 F.3d 1283, 1287 (11th Cir.2002) (per curiam), *cert. denied*, 71 U.S.L.W. 3367, 2003 WL 21210593 (U.S. Nov. 8, 2002) (No. 02-728); *see also Harry*, 291 F.3d at 772 ("Even if a statute's legislative history evinces an intent contrary to its straightforward statutory command, we do not resort to legislative history to cloud a statutory text that is clear" (internal quotation marks omitted).); *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir.2000) (en banc) ("When the import of the words Congress has used is clear . . . , we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language."), *cert. denied*, 532 U.S. 1065, 121 S.Ct. 2214, 150 L.Ed.2d 208 (2001).

[6] The minimum amount in controversy has been raised to $75,000. *See* 28 U.S.C. § 1332.

20, or 24 of the Federal Rules of Civil Procedure."[7] *Id.* § 1367(b). Notably, Federal Rule of Civil Procedure 23, which pertains to class actions, is not one of the enumerated exceptions. Exxon argues that because § 1367(a) requires that the district court have original jurisdiction over each member of the class, "it would have been redundant for Congress to enumerate Rule 23 as a specific exclusion from *supplemental* jurisdiction in § 1367(b) [sic]." We disagree. The fact that Congress created explicit exceptions to § 1367(a)'s broad grant of supplemental jurisdiction but did not include Rule 23 among them leads us to conclude that it did not intend to prevent district courts from exercising supplemental jurisdiction over the claims of class members. Indeed, it is a well-accepted rule of statutory construction in this Circuit that "where a statute explicitly enumerates certain exceptions to a general grant of power, courts should be reluctant to imply additional exceptions in the absence of a clear legislative intent to the contrary." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir.1991). Because we do not believe that the text of the statute expresses any legislative intent to prevent district courts from exercising supplemental jurisdiction in diversity class actions, we decline to "rewrite the statute to insert Rule 23 into § 1367(b)'s list of exceptions." *Rosmer*, 263 F.3d at 115; *see also Harris v. Garner*, 216 F.3d 970, 976 (11th Cir.2000) (en banc) ("We will not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite it."), *cert. denied*, 532 U.S. 1065, 121 S.Ct. 2214, 150 L.Ed.2d 208 (2001).

[7] Section 1367(a)'s grant of supplemental jurisdiction also is subject to the exceptions enumerated in subsection (c), but that subsection relating to discretionary jurisdiction is inapplicable to this case. *See* 28 U.S.C. § 1367(a).

Thus, we find that § 1367 clearly and unambiguously provides district courts with the authority in diversity class actions to exercise supplemental jurisdiction over the claims of class members who do not meet the minimum amount in controversy as long as the district court has original jurisdiction over the claims of at least one of the class representatives. We therefore conclude that § 1367 overrules *Zahn*.

II. Entry of Judgment

We now turn to the second issue certified for interlocutory review—whether the district court should have entered an aggregate judgment for the dealers based upon the jury's verdict finding Exxon liable to the dealers.[8] Because we do not believe that an aggregate final judgment was warranted in this case, we also must address the following issues raised in the dealers' cross-appeal: (1) whether the district court erred by determining that Exxon is permitted to participate in the claims process; and (2) whether it is proper to allow Exxon to assert set-off claims during the claims process.

A. Aggregate Judgment

The dealers argue that once the jury returned a verdict in their favor, the district court should have entered a final judgment awarding aggregate damages to the

[8] Exxon also argues that it was inappropriate for the district court to enter individual final judgments for each of the named class representatives, because no reasonable jury could have found that Exxon breached its obligations under the dealer agreements. Exxon's argument, however, is little more than an attack on all of the factual findings made by the jury. As we find that the jury's verdict was supported by substantial evidence, Exxon's argument is without merit. *See Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1154 (11th Cir.2002) ("A verdict must stand unless there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue" (internal quotation marks omitted).).

class.[9] Although they acknowledge that the jury did not award aggregate damages, the dealers argue that the court could have calculated the total amount of damages on its own and entered a judgment reflecting that amount. Assuming arguendo that the district court had the authority to calculate the dealers' damages and enter an aggregate judgment, we do not believe that it would have been appropriate for the court to exercise that authority in this case.[10]

As an initial matter, we note that our consideration of whether an aggregate final judgment is appropriate in this case is complicated by the lack of case law pertaining to this issue. Therefore, like the district court, we find ourselves without much guidance from other courts. Upon our own review, however, we agree with the district court that this is not the ideal case for the entry of an aggregate final judgment, because several significant obstacles prevent the entry of such a judgment. Moreover, we do not believe that an aggregate judgment would benefit the class greatly or result in a more expedient disposition of each dealer's claim.

Although we believe that Exxon's liability to the dealers was decided properly on a class-wide basis, we agree with the district court that the determination of the amount that each dealer was overcharged during the class period must take place on an individual basis, taking into account the amount of compensatory damages to which each dealer is entitled. Such individualized proof of claims would be necessary regardless of whether an aggregate judgment was entered, and the considerations that must be taken into account to

[9] We review the district court's denial of judgment for the class and entry of judgment in favor of the class representatives de novo. *See Maytronics, Ltd. v. Aqua Vac Sys., Inc.*, 277 F.3d 1317, 1320 (11th Cir.2002).

[10] Although we make this assumption, we express no opinion as to whether a district court has the authority to enter an aggregate judgment in a class action suit when the jury has not awarded aggregate damages.

calculate the correct amount of damages during the claims process reveal the obstacles to entering an aggregate judgment for the class. These obstacles include (1) accounting for those dealers who either have opted out of the class or not submitted claims; (2) accounting for those dealers whose claims were barred by the Ohio statute of limitations; (3) the difficulty of awarding prejudgment interest on a class-wide basis when the applicable amount of interest varies from state to state; and (4) determining whether the dealers' claims are subject to further reduction by set-off claims asserted by Exxon.[11]

In light of these obstacles, we believe that the district court's decision not to enter an aggregate judgment was proper, because the judgment would not have expedited or simplified the claims process. Indeed, it appears that the entry of an aggregate judgment would complicate the claims process further, and we believe that the only real effect of entering an aggregate judgment in this case would have been to set aside a large pool of money, which would have accumulated interest while the claims process took place.[12] Even if the funds were deposited immediately into an escrow account, the dealers would not benefit greatly from having the money set aside, because they would not be entitled to receive their individual shares of compensatory damages until after their claims had been proven.

[11] We will address the dealers' arguments with respect to the statutes of limitations in Section III(C) and the set-off claims in Section II(C).

[12] There is a high probability that an aggregate award of damages would have resulted in a substantial pool of unclaimed funds at the conclusion of the claims process. Before the district court and on appeal, the dealers raised the issue of whether Exxon would be entitled to reverter of the funds remaining at the conclusion of the claims administration process. Because we determine that an aggregate final judgment is not appropriate in this case, we need not address this issue.

We thus find no compelling justification for the entry of an aggregate final judgment in this case, and the dealers have pointed us to no authority suggesting that the entry of such a judgment was required.[13] Therefore, we conclude that, under the facts of this case, the district court's refusal to enter an aggregate final judgment for the class did not constitute reversible error.

B. Exxon's Right to Participate in the Claims Process

The district court determined that Exxon had a right to participate in the claims administration process, because it was a real party in interest and would have to pay the damages due as a result of the verdict and claims process. In light of that process, it determined that Exxon would be permitted to file objections to each dealer's claim contesting (1) whether the dealer actually was a dealer during the class period; (2) whether the dealer's claim was subject to a statute of limitations defense or barred by a release; (3) whether the amount of compensatory damages and prejudgment interest to which each dealer was entitled was calculated properly; and (4) whether the dealer's claim was subject to reduction by one of Exxon's set-off claims.

The dealers argue that Exxon had no right to participate in the claims process, because the determination of liability

[13] We note that this was not a case in which an aggregate award was authorized based upon the violation of a statute. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir.1990) (allowing the class to submit aggregate proof of damages for violations of the Farm Labor Contractor Registration Act where the class sought statutory rather than actual damages and individual proof of damages was not required for recovery). This also was not a case in which the precise aggregate damages of the class could be ascertained easily by a simple mathematical calculation. *See Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir.1977) (determining that the class's aggregate damages could be calculated by multiplying the number of unconverted debentures by the difference between the value and redemption price of the stock).

already had been made and the only remaining issue in this case was how to distribute the damages. In so arguing, the dealers rely primarily upon the Supreme Court's decision in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), in which the Court held that Boeing Co. did not have a present interest in the damage fund that was to be distributed to a class of investors. We, however, believe that *Boeing Co.* is inapposite to this case.

In *Boeing Co.*, an investor class action suit, Boeing Co. did not appeal the district court's entry of a judgment for the class. *Id.* at 479 n. 5, 100 S.Ct. 745. Rather, its appeal was narrowly tailored to the issue of whether attorney's fees could be awarded from the portion of the judgment fund that remained unclaimed at the conclusion of the claims process. *Id.* at 477, 100 S.Ct. 745. The Supreme Court determined that "[t]he judgment on the merits stripped Boeing of any present interest in the fund" and thus concluded that Boeing Co. had no interest in the litigation between the class and its attorneys regarding attorney's fees. *Id.* at 481 n. 7, 100 S.Ct. 745. The Court, however, acknowledged that "Boeing did have an interest, arising from its colorable claim for the return of excess money, in whether attorney's fees could be assessed against the entire fund rather than against the portion actually claimed." *Id.*

Thus, we believe that the dealers' reliance upon *Boeing Co.* is misplaced. Contrary to the dealers' assertions, that decision does not suggest that a defendant has no interest at all in the postverdict resolution of class claims; rather, it suggests that a defendant has no interest in how the class members apportion and distribute a damage fund among themselves. *Id.; see also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir.1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members."). In this case, however, no damage fund has been created and

there are several issues that must be resolved during the claims process. As one commentator noted in addressing individual issues among class members,

> If the only issue is to determine the amount of damages which class members are entitled to receive and this determination can be accomplished almost mechanically, simple proofs similar to those used for summary judgment are often appropriate, . . . especially when individual claims are small or relatively modest . . . .
>
> On the other hand, when large claims are involved, . . . one would expect that they would be more hotly contested by the defendants and more vigorously asserted by the claimants. The economic stakes being more substantial in large claims, fairness dictates that the procedures should allow for a more formal adversary proceeding.

3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 9:64, at 457-58 (4th ed.2002). Because Exxon has certain defenses to each dealer's claim, we believe that an adversarial claims process is warranted in this case. We therefore conclude that Exxon still has a present interest in the claims process, and due process requires that it be allowed to participate in that process.

C. Exxon's Right to Assert Set-Off Claims

Having determined that Exxon has a right to participate in the claims process, we must address the dealers' argument that the district court erred when it determined that Exxon could assert set-off claims against the dealers during the claims process, because its set-off claims were untimely raised.

Several federal courts have determined that the appropriate time for a class action defendant to raise affirmative defenses and set-off claims is during the damages phase of the action. *See Aamco Automatic Transmissions, Inc. v. Tayloe*, 67

F.R.D. 440, 450 (E.D.Pa.1975) (determining that the defendant's counterclaims "could be effectively presented when individual claims for damages are presented"); *Serpa v. Jolly King Rests., Inc.*, 1974 WL 941 (S.D. Cal.1974) ("Once liability is established and claims for damages filed, then and only then, may the defendants raise specific and detailed counterclaims to offset the damage claims."); *Donson Stores, Inc. v. Am. Bakeries Co.*, 58 F.R.D. 485, 489-90 (S.D.N.Y. 1973) ("If liability is established, other issues, including damages and counterclaims, can be handled on a class member-by-class member basis."). We agree with the reasoning of those courts and therefore find that Exxon was not required to assert its set-off claims in its answer.[14] Thus, the district court did not err in holding that Exxon can raise those claims during the claims administration process.

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[14] Ordinarily, a party must assert a counterclaim in its pleadings. *See* Fed.R.Civ.P. 13. Rule 13, however, is inapplicable in class action suits, because "absent class members are not opposing or litigating adversaries for purposes of Rule 13." *Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc.*, 238 F.Supp.2d 963, 967 (S.D.Ohio 2003) (internal quotation marks omitted). As one commentator has explained,

> Rule 13 expressly is applicable only to opposing parties.
>
> A court may properly conclude that absent class members are not opposing or litigating adversaries for purposes of Rule 13, and therefore Rule 13 is inapplicable in a class context. Because compulsory counterclaims can only be potentially involved when Rule 13 applies, if absent class members are not opposing parties within the meaning of the rule, it follows that any counterclaims that may be permitted in a class action are not governed by Rule 13 and *are purely discretionary with the court.*

2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:34, at 299-300 (4th ed.2002) (emphasis added). Thus, the district court had discretion to decide whether Exxon should be allowed to assert set-off claims against the dealers.

III. Exxon's Remaining Claims

Having answered the two certified questions, we now address the following additional issues raised by Exxon: (1) whether the class should have been certified; (2) whether the district court should have permitted the jury to consider extrinsic evidence pertaining to the dealer agreements; (3) whether the dealers' claims were barred by the applicable statutes of limitations; and (4) whether the district court should have admitted the testimony of the dealers' expert witness.

A. Class Certification

Exxon argues that the district court erroneously certified and tried this case as a class action pursuant to Rule 23(b)(3). Exxon maintains that as a result of this improper certification, each dealer's claim and Exxon's affirmative defenses were resolved on the basis of a single set of facts, ignoring the unique factual and legal issues relevant to the claims of each individual class member.

"We review the district court's grant of class certification for an abuse of discretion." *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1022 (11th Cir.1996). "A class action may be maintained only when it satisfies all the requirements of Fed.R.Civ.P. 23(a) and at least one of the alternative requirements of Rule 23(b)."[15] *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir.2000) (internal quotation marks omitted), *cert. denied sub nom. Zeirei Agudath Isr. Bookstore*, 532 U.S. 919, 121 S.Ct. 1354, 149 L.Ed.2d 285 (2001). The district court certified this class under Rule 23(b)(3), which requires "that the questions of law or fact common to the members of the class predominate

[15] Exxon does not challenge the district court's finding that the class met the requirements of Rule 23(a).

over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3).

"[T]o determine whether common questions predominate, we are called upon to examine the cause[ ] of action asserted in the complaint on behalf of the putative class." *Rutstein*, 211 F.3d at 1234 (alteration in original) (internal quotation marks omitted). The common issues among the class in this case were (1) whether the DFC program imposed an obligation on Exxon to reduce wholesale prices; (2) whether Exxon breached that obligation when it failed to continue providing the offset to the dealers; and (3) whether Exxon fraudulently concealed that breach. If these issues were subject to generalized proof and predominated over the individual issues raised by Exxon's affirmative defenses, class certification was proper. *See In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C.2002) ("[I]n general, predominance is met when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position" (internal quotation marks omitted).).

Contrary to Exxon's argument, we do not believe that this case is one "where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts." *Rutstein*, 211 F.3d at 1235-36 (internal quotation marks omitted). Exxon's primary argument in support of its contention that the class should not have been certified is that there were individual issues inherent in each dealer's breach of contract claim and its own affirmative defenses. We find that Exxon's argument that each breach of contract claim raised an individual issue is without merit. Because all of the dealer agreements were materially similar and Exxon purported to reduce the price of wholesale gas for all dealers, the duty of good faith was an obligation that it owed to the dealers as a whole. Whether it breached that obligation was a

question common to the class and the issue of liability was appropriately determined on a class-wide basis.

Thus, the real question for the district court was whether the common issue of liability predominated over the individual issues raised by Exxon's affirmative defenses, which pertained primarily to the issue of damages rather than liability. In similar situations, numerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir.2001) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues"), *cert. denied sub nom. Visa U.S.A. Inc. v. Wal-Mart Stores, Inc.*, 536 U.S. 917, 122 S.Ct. 2382, 153 L.Ed.2d 201 (2002); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir.2001) ("Although calculating damages will require some individualized determinations, it appears that virtually every issue prior to damages is a common issue"); *Tayloe*, 67 F.R.D. at 450 ("[I]n the event of a finding of liability, damages might have to be established on an individual basis. This fact alone, however, does not preclude class action treatment."). We agree. Based upon the facts of this case, we believe that Exxon's liability to the class for breach of the dealer agreements predominated over the individual issues relating to damages. Thus, the district court did not abuse its discretion in certifying the class.

B. Extrinsic Evidence

Exxon argues that the district court impermissibly allowed the jury to consider extrinsic evidence in determining whether Exxon breached its obligations under the dealer agreements.

"What a contract provision means, or whether it is ambiguous, are questions of law, which we review *de novo*." *Reynolds v. Roberts*, 202 F.3d 1303, 1313 (11th Cir.2000).

Generally, "parol evidence is admissible to prove the elements of an agreement [only] where a writing is ambiguous on its face or fails to contain the elements of a complete contract." *Indus., Invs. & Agencies (Bah.) Ltd. v. Panelfab Int'l Corp.*, 529 F.2d 1203, 1211 (5th Cir.1976). Under the Uniform Commercial Code (UCC), however, extrinsic evidence of the parties' "course of dealing or usage of trade" or "course of performance" may be used to explain or supplement the writing. U.C.C. § 2-202(a). The UCC therefore rejects the common law rule that parol evidence is admissible only where the terms of a contract are ambiguous. *See id.* § 2-202, cmt. n. 1(c); *see also Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 8 (4th Cir.1971) (recognizing that the UCC changed the common law rule "that extrinsic evidence may not be received to explain or supplement a written contract unless the court finds the writing is ambiguous").

In this case, the district court determined that because Exxon was accused of breaching its contractual duty of good faith in setting its wholesale prices, evidence pertaining to "Exxon's adoption and implementation of the DFC program, the unilateral amendment of its dealers' credit card agreements, its official public explanation of its performance obligation and its claimed history of meeting its performance obligations to its dealers" was relevant evidence of the manner in which Exxon set its prices during the period in which the DFC program was in effect. *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1300, 1306 (S.D.Fla.1999). The court thus believed that such evidence would assist the jury in determining whether Exxon breached its duty under the dealer agreements. We agree and conclude that the district court correctly determined that the dealers could use extrinsic

evidence to explain the nature of Exxon's good faith obligation to the dealers.[16]

C. Statutes of Limitations

Exxon contends that the district court erred when it found that, with the exception of the Ohio dealers, none of the dealers' claims were barred by the applicable statutes of limitations.[17] Exxon posits that most jurisdictions required

[16] Exxon also argues that the district court erred in submitting whether this case constituted a normal case under the UCC to the jury. With respect to open-price terms, section 2-305(2) of the UCC provides that "[a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith." U.C.C. § 2-305(2). The official comment to section 2-305(2) provides that "[g]ood faith includes observance of reasonable commercial standards of fair dealing. . . . But in the normal case, a posted price or a . . . price in effect . . . satisfies the good faith requirement." *Id.* § 2-305, cmt. n. 3 (internal quotation marks omitted). Exxon argues that because the dealers were charged Exxon's price in effect at the time of fuel deliveries, it satisfied the good faith requirement. The dealers alleged, however, that this case was not a normal case, because Exxon was attempting to drive some of the dealers out of business, and, therefore, Exxon did not satisfy the good faith requirement. We agree with the district court that whether this case constituted a normal case was a factual issue necessary to determine whether Exxon acted in good faith. It therefore was a question for the jury.

Exxon further argues that even if this were a question for the jury, the district court erred in giving the jury an instruction defining the term "normal" in accordance with the dictionary definition. Exxon, however, acknowledges that the UCC does not define what constitutes a "normal" case, and Exxon does not suggest any alternative definition that would have been more suitable. We previously noted that "to determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir.2001). We therefore do not believe that the district court erred in defining the word "normal" by providing the jury with the dictionary definition of the term "normal."

[17] After reviewing the relevant law in each jurisdiction, the court determined that fraudulent concealment was not a defense to the statutes of limitations in Ohio and Florida. After the trial, however, the court noted

that a breach of contract action be brought within four years of the breach and that most of the dealers' claims occurring prior to May of 1987 were barred, because the dealers did not file suit until May of 1991. The dealers, however, allege that the statutes of limitations were tolled, because Exxon fraudulently concealed its breach.

The district court determined that whether Exxon fraudulently concealed its breach was a question of fact for the jury. After the jury returned its verdict, in which it found that Exxon fraudulently concealed its breach, Exxon filed a motion for a judgment as a matter of law or, in the alternative, a motion for a new trial based in part upon its contention that the dealers did not prove the elements of fraudulent concealment. The court, however, found that the dealers presented "clear and convincing" evidence that Exxon fraudulently concealed its breach and denied the motion.

"A district court's denial of a motion for judgment as a matter of law is reviewed by this court *de novo*." *Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1176 (11th Cir.2002). The motion should be granted "only if there was no legally sufficient basis for a reasonable jury to find in favor of the nonmoving party." *Id.* at 1176-77 (internal quotation marks omitted).

After a careful review of the record, we believe that the evidence presented at trial was sufficient to support the jury's finding that Exxon fraudulently concealed its breach of the dealer agreements. The dealers presented evidence that each year, at annual meetings between Exxon executives and dealer representatives, the executives told the dealers that the DFC offset still was being provided even though the

that a recent Florida Supreme Court decision changed the law in Florida pertaining to the delayed discovery doctrine. Based upon that change in the law, the court concluded that the Florida dealers' claims were not barred by the statute of limitations.

executives knew otherwise. Although these statements were not made to each individual dealer, they were made to the dealer representatives who in turn were asked to report to their constituent dealers what was discussed at the meetings. Exxon argues that the dealers presented no evidence at trial that the representatives actually did report back to their constituent dealers, but two Exxon executives testified that the minutes of each annual meeting were sent to each dealer representative with the intention that they then be mailed to each individual dealer. This evidence was sufficient for the jury to find that the Exxon executives' statements regarding the DFC program were disseminated among the dealers and that the dealers relied upon those representations.

Because we find that there was a legally sufficient basis for finding that Exxon fraudulently concealed its breach, thereby tolling the statutes of limitations, we conclude that Exxon was not entitled to a judgment as a matter of law or a new trial upon that basis.[18]

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[18] Additionally, Exxon argues that the district court erred by failing to enforce written releases signed by approximately 5193 of the dealers at the end of their respective terms as Exxon dealers. The releases purported to release both parties from any and all causes of action arising out of or in connection with the dealer agreements. The district court determined that, like the dealer agreements, the releases were governed by the UCC and therefore were subject to the same duty of good faith as the dealer agreements. It thus concluded that the releases would be voidable if the jury found that Exxon breached its duty of good faith and fraudulently concealed its breach.

It is well settled that a party's fraud can render a release voidable. *See, e.g., Kobatake v. E.I. DuPont De Nemours & Co.*, 162 F.3d 619, 625 (11th Cir.1998) (per curiam) (applying Georgia law); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1314-15 (5th Cir.1983) (recognizing that fraudulent inducement or concealment can void a release). Because we believe that the jury's finding that Exxon fraudulently concealed its breach was supported by substantial evidence, we conclude that the releases signed by the dealers were voidable, with

D. Expert Testimony

Exxon argues that the district court erred in admitting the testimony of Dr. Raymond Fishe, the dealers' expert witness, because he had no specialized knowledge of pricing systems in the petroleum industry and his methodology was flawed.

"We review a trial court's evidentiary rulings on the admission of expert witness testimony for abuse of discretion." *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1312 (11th Cir.2000). The district court conducted an extensive six-day hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). After the hearing, at which the court heard testimony from both parties' expert witnesses, it entered a lengthy order determining that (1) both parties' expert witnesses were qualified to testify; (2) the methodologies of both experts were sufficiently reliable; and (3) the experts would assist the jury in understanding the issues at trial. Based upon these determinations, the court concluded that each expert met the requirements of *Daubert* and Federal Rule of Evidence 702.

Given the district court's exhaustive effort in determining that Dr. Fishe's methodology was reliable, we do not believe that it abused its discretion in allowing him to testify at trial where Exxon was able to cross-examine him fully and refute his testimony through the use of its own expert witness.

CONCLUSION

Thus, we join with the Fifth, Seventh, Ninth, and Fourth Circuits in ruling that § 1367 authorizes the exercise of supplemental jurisdiction in a diversity class action over claims that do not meet the minimum amount in controversy requirement, overruling the Supreme Court's holding in

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the exception of the Category-four releases signed by certain Delaware dealers, which the district court determined were enforceable.

Zahn. It therefore was appropriate for the district court to exercise jurisdiction over the claims of those class members whose claims did not meet the $50,000 minimum amount in controversy requirement. We further find that the district court did not err in denying the dealers' motion for entry of an aggregate final judgment and devising an appropriate procedure for the administration of each dealer's claim. With respect to each of the remaining issues raised by the parties, we find no reversible error. Accordingly, we AFFIRM.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Filed Oct. 23, 2001]

CASE NO. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

UNITED STATES MAGISTRATE
JUDGE ANDREA M. SIMONTON

AMENDED

FINAL JUDGMENT ON JURY VERDICT
FOR NAMED PLAINTIFFS

This action came on for trial before the Court and a jury, Honorable Alan S. Gold, presiding. The issues have been duly tried and the jury has duly rendered its verdict. For the reasons stated in the Court's August 7, 2001 Order on Procedure Determination and Entry of Final Judgment, the Court finds that there is no just reason for delay in entering a final judgment on behalf of the named plaintiffs in this action.

Accordingly, pursuant to Rule 54(b), Fed. R. Civ. P., it is Ordered and Adjudged, and the Court directs entry of a Final Judgment, that the named Plaintiffs, Robert Lewis Inc., G.G.S.K. Inc., G.G.S.K.1 Inc., John Pinder, Lee-Langley

Corp,. Martin I. Cook, David Wise, Willston Center Autocare, Inc., Rylyns Enterprises Inc. and Allapattah Services, Inc. shall recover of the Defendant, Exxon Corporation compensatory damages and prejudgment interest in the following amounts:

Plaintiff	Compendatory Damages	Prejudgment Interest	Total Damages
1. Robert Lewis, Inc.	$70,678.00	$87,969.00	$158,647.00
2. G.G.S.K. Inc.	$42,007.00	$58,287.00	$100,294.00
3. G.G.S.K.1 Inc.	$90,610.00	$105,678.00	$196,288.00
4. John Pinder	$103,594.00	$159,015.00	$262,609.00
5. Lee-Langley Corp.	$186,573.00	$192,218.00	$378,791.00
6. Martin I. Cook	$207,522.00	$238,107.00	$445,629.00
7. David Wise	$116,178.00	$134,192.00	$250,370.00
8. Willston Center Autocare, Inc.	$96,556.00	$97,567.00	$194,123.00
9. Rylyns Enterprises Inc.	$257,194.00	$155,793.00	$412,988.00
10. Allapattah Services, Inc.	$43,057.00	$52,335.00	$95,392.00

with interest thereon at the rate provided by law.

The Court reserves jurisdiction to award and allocate taxable costs, reimbursable expenses, attorney's fees and class representative incentive awards, to administer the determi-
nation of damages of class members, and for such further relief as is just and proper with respect to their named Plaintiffs and the Class as a whole.

Dated this 10th day of October, 2001.

Clarence Maddox
CLERK OF COURT

by: /s/ [Illegible]
JACOB M. HASBUN, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 91-0986-CIV

ALLAPATTAH SERVICES, INC., *et. al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

Aug. 7, 2001

ORDER ON PROCEDURE FOR DETERMINATION AND ENTRY OF FINAL JUDGMENT

GOLD, *District Judge*.

I. *INTRODUCTION*

On February 20, 2001, the jury rendered a Special Verdict in favor of the Class Dealers [D.E. # 1395].[1] Following the

[1] The jury's Special Verdict is the culmination of a long and arduous process which began in 1991 and resulted in a mandamus proceeding before the Eleventh Circuit Court of Appeals, two jury trials, and the rendition of numerous substantive court orders. *See, e.g.*, April 21, 1998 *Order Denying Exxon's Motion for Summary Judgment On Count I* (Kehoe, J.) [D.E. # 908]; *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1300 (S.D.Fla.1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1308 (S.D.Fla.1999) (setting forth the essential facts of the dispute); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1326 (S.D.Fla.1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1335 (S.D.Fla.1999); and *Allapattah Servs., Inc. v. Exxon Corporation*, 188 F.R.D. 667 (S.D.Fla.1999).

rendition of the Special Verdict, the Court held a status conference with the parties on March 1, 2001, to discuss post-verdict procedures, the entry of judgment, and the claims administration process. At the direction of the Court, the parties have filed a series of motions and memoranda addressing complex and novel matters of first impression since, as recognized by the parties, few class matters of this magnitude have proceeded to trial and verdict.[2] On June 7, 2001, the Court held oral argument and further directed the parties to file additional memoranda on certain specific issues [D.E. # 1427]. All such memoranda have been received and reviewed.[3]

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[2] *See* Plaintiffs' Memorandum on Proposed Post Trial Procedures [D.E. # 1400], filed on February 28, 2001; Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment [D.E. # 1409], filed on March 30, 2001; Plaintiffs' Memorandum in Support of Plaintiffs' Entitlement to Discretionary Award of Prejudgment Interest [D.E. # 1421], filed on May 25, 2001; Plaintiffs' Reply to Exxon's Memorandum Regarding Plaintiffs' Motion for Entry of Order on Procedure for Determination of Final Judgment [D.E. # 1424], filed on June 4, 2001; and Plaintiffs' Reply Memorandum In Support of Discretionary Award of Prejudgment Interest [D.E. # 1433], filed on June 21, 2001. *See also* Exxon Corporation's Proposed Orders, Objections and Requests for Briefing Schedule and Hearing [D.E. # 1397], filed on February 26, 2001; Submission of Defendant Exxon Corporation with Respect to Hearing Regarding Proposed Judgment and Post-Trial Proceedings [D.E. # 1399], filed on February 28, 2001; Response of Exxon Corporation in Opposition to Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment [D.E. # 1416], filed on May 11, 2001; and Response of Exxon Corporation to Plaintiffs' Submission Regarding Entitlement to Discretionary Award of Prejudgment Interest [D.E. # 1423], filed on June 4, 2001.

[3] *See* Memorandum of Exxon Corporation Regarding Supersedeas Bond [D.E. # 1430], filed on June 21, 2001; Memorandum of Exxon Corporation Regarding Entitlement to Set Off [D.E. # 1431], filed on June 21, 2001; Plaintiffs' Supplemental Memorandum Regarding Judicial Authority For Entry of Judgment in the Full Amount Awarded By the Jury [D.E. # 1432], filed on June 21, 2001; Plaintiffs' Supplemental

In brief, the Plaintiffs contend that, based on the jury's verdict, they are entitled to entry of a final judgment for the total amount of the compensatory damages suffered by the class as a whole, plus pre-judgment interest calculated in accordance with the laws of the 35 political jurisdictions in which the Dealers purchased motor fuel from Exxon during the class period (March 1, 1983, through August 31, 1994) ("Class Period"). According to Plaintiffs, the final judgment would reserve jurisdiction to establish and implement a claims administration procedure by which class members would claim their share of the purported common fund. Plaintiffs contend that Exxon would have no role or standing to participate in the claims administration process or to seek recovery of any unclaimed portion of the purported common fund created by the final judgment.

Exxon, on the other hand, views the form the final judgment would take and its participation in the claims process

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Memorandum Regarding Subject Matter Jurisdiction [D.E. # 1435], filed on June 21, 2001; Plaintiffs' Response to Memorandum of Exxon Corporation Regarding Entitlement to Setoff [D.E. # 1441], filed on July 5, 2001; Plaintiffs' Response to Exxon's Memorandum Regarding Supersedeas Bond [D.E. # 1442], filed on July 6, 2001; Surreply of Exxon Corporation to Plaintiffs' Submission Regarding Entitlement to Discretionary Award of Prejudgment Interest [D.E. # 1443], filed on July 6, 2001; Response of Exxon Corporation in Opposition to Plaintiffs' Supplemental Memorandum Regarding Subject Matter Jurisdiction [D.E. # 1444]; Defendant's Memorandum in Response to Plaintiffs' Supplemental Memorandum Regarding Entry of Judgment [D.E. # 1445], filed on July 6, 2001; Reply Memorandum of Exxon Corporation Regarding Entitlement to Set Off [D.E. # 1449], filed on July 13, 2001; Reply Memorandum of Exxon Corporation Regarding Supersedeas Bond [D.E. # 1450], filed on July 13, 2001; Plaintiffs' Reply in Support of Supplemental Memorandum Regarding Subject Matter Jurisdiction [D.E. # 1451], filed on July 13, 2001; and Plaintiffs' Reply in Support of Supplemental Memorandum Regarding Judicial Authority for Entry of Judgment in the Full Amount Awarded by the Jury [D.E. # 1452], filed on July 13, 2001.

quite differently. First, Exxon claims that the Plaintiffs' proposed procedure would constitute a judicial taking of Exxon's property in violation of basic due process rights because it would necessarily result in a final judgment for more than the actual compensatory damages due to class members who may pursue their individual breach of contract claims. According to Exxon, Plaintiffs' proposal would accomplish this by reversing the process for entering a final judgment so that an aggregate amount of class-wide damages would be immediately entered before the total amount of actual compensatory damages claimed by individual class members on their separate breach of contract claims is determined. Exxon raises again its argument, based on recent case law, that the Court cannot enter an award of class-wide damages because it lacks subject matter jurisdiction over the claims of many class members.

Second, Exxon disputes Plaintiffs' contention that, after an aggregate damage award is entered, Exxon would not be entitled to recover any portion of the proposed award that is not claimed as actual compensatory damages by individual class members. Exxon also disagrees with the suggestion that it would not be permitted to participate in the claims administration process. According to Exxon, to require it to pay additional sums or to prevent it from recovering any sums that remain after a claims process is completed serves no compensatory purpose and, therefore, constitutes punitive relief that is expressly prohibited by the Uniform Commercial Code. For the same reason, Exxon claims it is entitled to participate in the claims administration process to ensure that, through duplicate claims or otherwise, no class member receives more than the compensatory damages to which he or she is entitled. In addition, Exxon claims that it is entitled to assert rights of set-off against class members who file claims.

Third, Exxon claims that Plaintiffs' proposed procedure does not address the issues involved in attempting to award prejudgment interest under the laws of different states on the

basis of the Special Verdict rendered in Plaintiffs' favor. According to Exxon, there is no basis in the jury's verdict (or the trial record) for determining the amount of damages suffered by dealers in any particular state against which to apply the state's rate of prejudgment interest.

By this Order, the Court has endeavored to decide all issues posed by the parties and also to approve the form of the judgment to be entered on the Special Verdict in accordance with Fed.R.Civ.P. 58. Although not a final judgment, the Court shall utilize the procedures in 28 U.S.C. § 1292(b) to authorize an interlocutory appeal. For this reason, the Court has ordered Exxon to file its Rule 50 and 59 motions so that, if denied, those rulings could be considered as part of the § 1292(b) review. Each substantive issue is addressed below.

II. *WHETHER THE PLAINTIFFS ARE ENTITLED TO AN AGGREGATE JUDGMENT IN FAVOR OF THE CLASS AS A WHOLE?*

1. Plaintiffs' Further Contentions.

As stated above, Plaintiffs claim that they are entitled to entry of a final judgment for the total amount of the compensatory damages suffered by the class a whole, plus pre-judgment interest for the class as a whole calculated in accordance with the laws of the 35 political jurisdictions in which the Dealers purchased motor fuel from Exxon during the Class Period. Plaintiffs further claim that compensatory damages may be "ministerially computed" by the court by simply multiplying the jury's annual cents per gallon damage awards times the annual gallons of motor fuel purchased by the Class Dealers as reported in the electronic database of motor fuel volumes produced by Exxon, which Plaintiffs have accepted as correct. Plaintiffs next assert that the same annual cents per gallon damage figures also provide the means to accurately calculate pre-judgment interest by state, by year, in accordance with the laws of the 35 political

jurisdictions. Finally, because Exxon's Dealer Volume Database reports Class Dealer motor fuel purchases on a store level basis, the Plaintiffs contend that the jury's cents per gallon damage award also provides a precise means of allocating damages among individual class members in the claims administration process.

2. Analysis.

In analyzing Plaintiffs' contentions, it is first necessary to determine what the jury did, then whether, and under what authority, the Court may enter an aggregate judgment for both compensatory damages and prejudgment interest, and, finally, to consider the propriety of entering such a proposed final judgment given the facts and circumstances of the case.

a. What Did the Jury Decide by its Special Verdict?

In *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1335, 1342 (S.D.Fla.1999), this Court stated that, "the ultimate question for the jury is whether Exxon initially gave, and then 'took back' the [DFC] adjustment in total as of March 1, 1983 through August, 1994?" By its Special Verdict, the jury determined that Exxon was liable to the Class Dealers for the "take back," and that it had failed to reduce the wholesale price of motor fuel for the Class Period. The jury then determined the time period by year in which the failure to reduce the wholesale price occurred and the amount, in cents per gallon, by which Exxon failed to provide the reduction [*See* D.E. # 1395].

As is self-evident from the Special Verdict, the jury did not award aggregate compensatory damages in favor of the Plaintiffs. To do so and derive a true aggregate award, the jury would have had to further reduce the total number of gallons of motor fuel sold during the Class Period to account for "opt outs," as well as to make further reductions based upon Exxon's valid affirmative defenses, including statute of

limitations in Ohio. Obviously, the Plaintiffs recognize the necessity for such reductions because, in their proposed procedure, Plaintiffs request the Court to do what the jury did not do; that is, to "ministerially" undertake such an analysis and render an aggregate damage award for the class in the form of a final judgment.

If the jury did not render an aggregate compensatory damage award, what did the jury do by its Special Verdict? Besides finding for Plaintiffs on issues of liability and causation, the jury, in accordance with Fed.R.Civ.P. 49(a), determined class damages in the form of a common guideline or factor [cents per gallon on a year to year basis during the Class Period]. Otherwise stated, the jury did not itself award aggregate class damages or a "fluid verdict"[4]; rather, the jury decided the applicable factor or guideline that will apply to determine the measure of damages of each Class Dealer during the claims administration process without resort to an aggregate fund.

b. Given the Jury's Special Verdict, Under What Authority May the Court Now Ministerially Enter An Aggregate Final Judgment for Compensatory Damages and Prejudgment Interest?

Plaintiffs' briefs did not initially address this question. At oral argument, and in subsequent briefs, Plaintiffs' counsel argued that such authority is provided by virtue of the parties' own stipulation and by Fed.R.Civ.P. 23, 49, and 58. Exxon vigorous denies any such stipulation, or that any rule of civil procedure authorizes the Court to act as Plaintiffs' request.

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[4] A fluid verdict occurs when damages are calculated in the aggregate and individual claims are satisfied out of an aggregate fund. *See Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100, 114 (E.D.Va.1980) (stating that fluid recovery may occur when damages are calculated in aggregate and individual claims are satisfied out of aggregate fund).

i. Stipulation between the parties

Plaintiff argues that, while Exxon did not stipulate to a class-wide damage calculation, it did stipulate to the facts upon which a class-wide damage calculation can be administratively accomplished by the Court post-trial. [D.E. # 1432, p. 7]. In support, Plaintiff relies on the transcript of the first trial [Transcript, Trial I at 3024:13-3028:16], as well as a written stipulation between the parties concerning the submission of damages to the jury on a cents-per-gallon basis using the volumes of both gasoline and diesel fuel [Exhibit "A" to D.E. # 1432].

However, the 'stipulation' agreement submitted by Plaintiff as Exhibit A to its Supplemental Memorandum Regarding Judicial Authority for Entry of Judgment in the Full Amount Awarded by the Jury [D.E. # 1432] is not signed by both parties and constitutes merely an offer by Exxon, which Plaintiffs apparently rejected, to stipulate to a procedure for recalculating Plaintiffs' proposed measure of damages in the event the Court permitted them to assert claims for sales of diesel fuel, subject to a number of contingencies, such as exhaustion of appeals. The offer expressly states that it was, "not intended as, nor shall it constitute, a waiver of any objection by Exxon to plaintiffs' proposed calculation of damages, including, but not limited to, whether damages should be calculated on a cents-per-gallon basis . . ." *See* Exhibit "A" to D.E. # 1432 at ¶ 3. The proposed stipulation also specifies that Plaintiffs' recalculated cents-per-gallon damages number was to be used for the sole purpose of allocating damages among class members who submit appropriate claims. *Id.* at ¶ 2(c). In sum, the document presented by Plaintiffs is not a binding stipulation between the parties to the facts upon which a class-wide damage calculation can be administratively accomplished by the Court post-trial, and by its very terms it would not provide authority for the Court to enter an aggregate final judgment.

Accordingly, I find that there was no stipulation between the parties that would provide authority for the Court to ministerially enter an aggregate final judgment for compensatory damages and prejudgment interest.[5]

ii. Federal Rules of Civil Procedure

Plaintiffs argue that Rule 58[6] and Rule 23[7], read together, require the Court to enter final judgment on the Special Verdict, and that Rule 49[8] specifically contemplates that the

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[5] A review of the trial transcript identified by the Plaintiffs also provides no authority for their contentions. The parties have vigorously disputed every aspect of this case, and the appropriate means of calculating damages is no exception.

[6] Rule 58 of the Federal Rules of Civil Procedure provides, in pertinent part:

> [U]pon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it.

[7] Plaintiffs rely on Rule 23(c)(2), which requires notice to all members of a(b)(3) class action that, among other things, "the judgment, whether favorable or not, will include all members who do not request an extension." Fed.R.Civ.P. 23(c)(2). Furthermore, Rule 23(c)(3) provides that, "[t]he judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class." Fed.R.Civ.P. 23(c)(3)

[8] Plaintiffs rely expressly on Rule 49(a), which states:

> *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its

Court will use the jury's findings to enter aggregate damages in a final judgment. Exxon argues in response that the Federal Rules of Civil Procedure do not compel the Court to enter an aggregate award of damages equal to the total damages suffered by the class. The Court concurs with Exxon that the Rules do not establish an independent legal basis for this Court to ministerially aggregate compensatory damages in a final judgment when the jury made no such findings in its Special Verdict, and where the adjustments required by the Court are beyond what are "self-evident" mathematical calculations based on the jury's Special Verdict. Beyond that, the obstacles to awarding prejudgment interest on a class basis preclude an aggregate final judgment even if one could be rendered within the Court's discretion for compensatory damages.

Rule 58 and Rule 23 state that the Court shall promptly approve the form of the judgment after entry of the Special Verdict and that, in a 23(b)(3) class action, the judgment shall describe those to whom notice was provided and have not requested exclusion, and whom the court finds to be members of the class. Nothing in either Rule contemplates or accounts for adjustments being made to a final damage award, as is required in this case. These adjustments include determining the following: (a) the damages attributable to sales to dealers who elected to "opt-out" of the class; (b) the damages attributable to sales to dealers whose claims are barred by the applicable statutes of limitations; and (c) the damages attributable to sales covered by releases.

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findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Furthermore, Rule 49(a) also fails to set forth the authority for Plaintiffs' requested relief. While the Court concurs with the Plaintiffs that, in certain limited circumstances, a ministerial aggregating process may be performed by the court, this case is distinguishable from the cases that have utilized such an approach. For example, in *John R. Lewis Inc. v. Newman*, 446 F.2d 800 (5th Cir.1971), the jury returned a special verdict pursuant to Rule 49 and found that the defendant was liable for the value of certain stocks sold to the plaintiff, and that each share of stock had a fair market value of $10.47½. The trial judge then rendered judgment by multiplying this figure by 10,000, or the number of shares sold to each of the two plaintiffs. Unlike this case, the number of plaintiffs in *John R. Lewis* was limited to two, the measure of damages of each share of stock was the same, and the total number of stocks was expressly found by the jury. The case at bar requires calculation of damages for a class of potentially over ten-thousand plaintiffs, the exact number of which is subject to several as yet to be completed adjustments.

Plaintiffs also rely on *McBrayer v. Teckla, Inc.*, 496 F.2d 122 (5th Cir.1974). In *McBrayer*, the jury found in a special verdict that the plaintiff, a single individual, would have sold 46,000 units of his product if not for the defendant's wrongful conduct, and the trial judge entered judgment in the amount of $46,000 by multiplying the number of units by the value of the product ($1/unit). The appellate court reversed, finding that the jury lacked a valid basis for concluding that 46,000 units would have been sold during the contract term. *McBrayer*, 496 F.2d at 127-28. The appellate court did not specifically address the propriety of the district court's act of multiplying the number of units found by the jury by the price per unit. As such, *McBrayer* is of little, if any, precedential value. Furthermore, *McBrayer* clearly did not involve the application of the number of adjustments of the magnitude required in this case in order to reach a final damage judgment.

In sum, there is nothing in the Federal Rules of Civil Procedure that requires the Court to enter a final judgment containing an aggregate damage award at this stage of the proceedings. Even if such authority is implied in limited, self-evident circumstances, its application, as a matter of discretion, is inappropriate here. Unlike the simplified example provided by Plaintiffs of a case in which the jury special verdict says, "We find that the parties had a contract for the sale of 100 widgets. We find that the defendant failed to deliver the widgets. We find that the widgets were worth $4 each," and the Court then performs the ministerial function of multiplying the two amounts and entering a final judgment for the plaintiff of $400 [*see* D.E. # 1432, p. 11-12], the Special Verdict in this case does not lend itself to such treatment. There was never any discussion, agreement, or consideration by the parties or the Court that such a procedure would be followed, because it was always known that there would be significant unclaimed amounts. No discussion occurred at any time to create a *cy pres* fund. The Special Verdict form was limited to finding a common damage factor to measure individual compensatory damages, and, given the lack of any agreement to the contrary and the unique nature of the class and the required adjustments to the total damage amount, it would be inappropriate for the Court to go beyond the Special Verdict form to enter an aggregate compensatory and prejudgment interest award to the class.

c. Does the Case Law Provide Authority for the Court to Ministerially Calculate Aggregate Damages and Enter Final Judgment Therefor?

Plaintiffs argue, in their "Reply to Exxon's Memorandum Regarding Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment" [D.E. # 1424], that, "Consistent with the provisions of the Rule [Fed.R.Civ.P. 23(c)(3)], the federal trial and appellate courts have regularly entered or approved of lump sum judgments

for the aggregate amount of compensatory damages suffered by all class members in common fund, contract-based class actions brought under Rule 23(b)(3)." In support, Plaintiffs cite to *Boeing Co. v. Van Gemert*, 444 U.S. 472, 475-77, 100 S.Ct. 745, 748, 62 L.Ed.2d 676 (1980); *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 408-09 (11th Cir. 1986); *Fogie v. THORN Am., Inc.*, 190 F.3d 889, 904-05 (8th Cir.1999); and *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir.1990).

During oral argument, however, Plaintiffs conceded that none of these cases directly hold that a district court may ministerially calculate aggregate damages in the absence of a jury verdict to that effect. Upon independent review, the Court reaches this conclusion as well.

In *Boeing*, for instance, the Supreme Court did not expressly decide the propriety of an aggregate judgment in a class action context, because the issue was never raised on appeal.[9] Rather, the precise question presented in the class action case was whether a proportionate share of the fees awarded to lawyers who represented the successful class may be assessed against the unclaimed portion of the fund created by judgment. *Boeing*, 444 U.S. at 473, 100 S.Ct. at 747. There, the district judge entered a judgment which awarded a determinate fund for the benefit of every member of the class

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[9] In *Boeing*, the district court awarded as damages the difference between the redemption price of the outstanding debentures and the price at which two shares of Boeing's common stock traded on the last day for exercising conversion rights. *See Boeing*, 444 U.S. at 474-75, 100 S.Ct. at 747. By its judgement, the district court ordered Boeing to deposit the principal sum of $3,289,359 into an escrow account, which was then administered by a Special Master. *Id.* at 476 n. 3, 100 S.Ct. at 748 n. 3. Thus, it appears that, unlike this case, the district judge awarded aggregate lump sum damages to the class. Class members who had filed individual claims also contended that they were entitled to receive pro rata shares of any unclaimed damages, or that they should receive enough of the unclaimed money to pay their legal expenses. *Id.* at 475, 100 S.Ct. at 747.

whom the plaintiffs represented. Boeing did not appeal the judgment awarding the class a sum certain. *Id.* at 479, 100 S.Ct. at 750. Although Boeing argued before the Supreme Court that the judgment fund conferred no benefit on class members who failed to claim against it, the Supreme Court determined that, "[n]othing in the [district] court's order made Boeing's liability contingent upon the presentation of individual claims." *Id.* at 481 n. 5, 100 S.Ct. at 750 n. 5. The Court further stated that, "[s]ince there was no appeal from the judgment that quantified Boeing's liability, Boeing presently has no interest in any part of the fund." *Id.* at 481, 100 S.Ct. at 751. Consequently, the Supreme Court assumed the propriety of the district judge's final judgment since it never was appealed. Moreover, there is no indication in *Boeing* that the district judge reached an aggregate class damage by following a procedure comparable to that proposed by Plaintiffs in this case.

In *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405 (11th Cir.1986), tenants in a public housing complex brought suit for injunctive relief and monetary damages in a class action involving utility allowances to tenants in a public housing complex. The district court found that the defendant, Greater Gadsden, breached a contractual duty to comply with applicable HUD regulations. Evidentially, the district court determined the amount of compensatory damages on summary judgment. In that regard, the Eleventh Circuit stated: "The district court's calculations were based on data agreed to by all parties, abut [sic] which there was no genuine issue of fact." *Nelson*, 802 F.2d at 409. Under the district judge's order, any compensatory damages which were not claimed within a specified period of time were to be used by Greater Gadsden to increase the energy efficiency of the apartment units or to improve the defendant-supplied appliances within the units. *Id.* at 409. The Eleventh Circuit did not reject the district court's approach as an improper "fluid recovery," partially because the plaintiffs had proven individual damages

based on individual usages. Accordingly, nothing in *Nelson* supports a ministerial calculation of aggregate damages where the judge is not the trier of fact.

d. Is this a "Common Fund" Case Upon Which a Aggregate Final Judgment Can Be Entered?

The answer is "no." The issue of "common fund" never arose in this case until after the jury's Special Verdict. By *sua sponte* order [D.E. # 1422], the Court requested the parties to address the "common fund" issue at oral argument for purpose of further analyzing subject matter jurisdiction. There, Plaintiffs addressed "common fund" in a different context as well. Plaintiffs contended that the Court may enter an aggregate final judgment because the jury established a "common fund" by its Special Verdict. Exxon denies that this is a common fund case. The Court concurs with Exxon that the jury's Special Verdict did not establish a common fund, but only a "common damage factor" to measure individual compensatory damages. Although Exxon does not concede this, the jury also found a good faith duty "common to all class members" to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit card recovery fee during the Class Period.

The essential facts of the case were set forth in *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1308 (S.D.Fla. 1999) (denying Exxon's renewed motion for summary judgment). For the most part, Plaintiffs established the same facts at trial. Plaintiffs established that every Sales Agreement in effect or entered into by Exxon and the Class Dealers during the Class Period contained an open price term, imposing a concurrent express duty to carry out the provisions of each Sales Agreement in good faith; that is, because of the nature of Exxon's obligation, each class member's individual sales agreement gave rise to a "collective" contractual duty to the "dealer class as a whole" to reduce wholesale prices to offset

the 3% fee imposed by Exxon to offset the cost of credit. The jury determined that Exxon breached its obligation to its Class Dealers [D.E. # 1395, p. 5].

While Plaintiffs convincingly argue that they have sought to enforce a right that is common to the class, and that such right is an indicia of a "common fund," what is missing to create a "common fund" is the *res* itself, such as a piece of land, an insurance policy, a lien, or an item of collateral, which the plaintiffs might claim as common owners or in which they might share a common undivided interest arising under a single title or right.[10] *See Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1263 (11th Cir.2000) ("Plaintiffs in paradigm 'common fund' cases assert claims to a piece of land, a trust fund, an estate, an insurance policy, a lien, or an item of collateral, which they claim as common owners or in which they share a common interest arising under a single title or right.") (*quoting Gilman v. BHC Secs. Inc.*, 104 F.3d 1418, 1424 (2d Cir.1997)). Here, there is no such *res*. Instead, the Class Dealers are asserting rights arising from their individual Sales Agreements, and, because they were successful, they will recover the amount of excessive motor fuel charges each paid under his or her own sales agreement. The fact that this recovery may be obtained based on a common damage factor and shared duty does not convert separate and distinct claims for damages into a fund in which the class members have a common and undivided interest. *See Morrison*, 228 F.3d at 1264 ("The members of the Policyholder Class are asserting rights arising from their individual insurance policies, and if successful, they will recover the amount of excessive premiums each paid under

[10] While there is a unitary decision on a common damage factor, there is no fixed asset or piece of property in which all class members have a pre-existing interest, or where apportionment or determination of one class member's interest cannot be made without affecting the proportionate interests of other similarly situated class members.

his own policy. The fact that this recovery may be obtained under an equitable theory of unjust enrichment does not convert separate and distinct claims for damages into a fund in which the class members have a common and undivided interest.").

In sum, Plaintiffs may not equate a class member's interest in the total damage award sought by the class with the "joint and undivided" interest in a single claim or "res," as required by *Morrison*, and thereby justify the entry of an aggregate judgment. As the Second Circuit stated in *Gilman*, 104 F.3d 1418, 1424 (2d Cir.1997) (cited at length in *Morrison*), "Gilman and his putative class have no joint interest other than a shared appetite for a money judgment payable by a single defendant—which is not the type of 'common and undivided interest' that warrants an exception to the rule against aggregating claims." *See also Gilman*, 104 F.3d at 1426 ("Such a 'fund' [damages from disgorgement of payments improperly retained] is created to facilitate the litigation process in virtually every class action and has nothing necessarily to do with whether the plaintiffs shared a pre-existing (pre-litigation) interest in the subject of the litigation . . . what controls is the nature of the right asserted, not whether vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs.").

e. Can the Court Enter a "Final Judgment" Based on the Jury's Special Verdict in this Case?

The answer is "no." Pursuant to Fed.R.Civ.P. 49, the court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. Subsequent to the jury's rendering of a special verdict, the court, pursuant to Fed.R.Civ.P. 58, is to approve the form of judgment, and the Clerk of Court is to enter it. Under these rules, a court may only enter a judgment consistent with the jury's verdict. When multiple parties are involved, "any

order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed.R.Civ.P. 54(b).

Where, as here, the verdict does not determine an aggregate compensatory award to the class as a whole, it is not "final" as contemplated in Fed.R.Civ.P. 54, 58, or 23, although, under Rule 58 and 23(c)(3), a judgment entered is conclusive as to the factual matters decided. No final judgment can be entered until after individual class members have made claims and both the validity and the amount of the claims have been determined; that is, to be "final," the judgment must adjudicate all aspects of the claim, including compensatory damages and prejudgment interest for each class member. *See generally Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742, 96 S.Ct. 1202, 1205-06, 47 L.Ed.2d 435 (1976) (no final, appealable judgment where "respondents, although having received a favorable ruling on the issue of petitioner's liability to them, received none of the relief which they expressly prayed for . . . . [T]hey requested damages, but were not awarded any . . . ."); *In re Atlas*, 210 F.3d 1305, 1308 (11th Cir.2000) (noting that "where assessment of damages or awarding of other relief remains to be resolved [judgments] have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291") (*quoting In re Morrell*, 880 F.2d 855, 856 (5th Cir.1989)).

f. What is The Propriety of Entering A Total Damage Aggregate Award in This Case?

The aggregate judgment issue did not arise during deliberation on jury instructions in either the first or second trial. If it had arisen, it would have been the subject of significant briefing and debate, since this is not a case where there is a

statutory authorization for an aggregate award. *Compare Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir.1990) (permitting aggregate proof of damages where the plaintiff class sought statutory not actual damages under the FLCRA and, as such, was not obligated to prove actual injury for each class member). Properly so, the jury in this case determined by their Special Verdict only a class wide measure of damages which then can be assessed mechanically to determine individualized claims.

Beside the issues of legality of entering an aggregate award of compensatory damages when the jury has not done so, the Court must further consider the "propriety" of an aggregate compensatory and prejudgment interest award under the circumstances of the case, including the potential sizeable *cy pres* fund due to the prospect of substantial unclaimed funds.[11]

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[11] When an aggregate class recovery is not fully allocated to class members, the unclaimed portion may be distributed for the indirect or partial benefit of the class under *cy pres* principles, including fluid recovery doctrines. *Newberg on Class Actions*, § 10.16. As recognized by *Newberg*, *cy pres* distributions remain controversial from the defendant's perspective. *Id.*

Plaintiffs argue that any unclaimed monies rightfully belong to injured class members and that to deny a *cy pres* approach is to give a windfall to a wrongdoer. At first blush, Plaintiffs' argument seems persuasive, but it is not supported by convincing precedent in class actions of this nature. All litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for wrongs he, she or it has committed. However, the court only is to do so by applying settled or clearly stated principles of law, rather than by some process of divination. *See Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1013 (2nd Cir.1973), *vacated on other grounds by Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

Plaintiffs' proposal envisions a significant unclaimed fund[12] which, under any and all circumstances, it argues should not be returned to Exxon. As Plaintiffs' state: "Reverter is not an option in this case because Exxon does not have a legitimate claim to the money. If all rightful owners do not appear to claim their share, the money should not go back to Exxon, which wrongfully separated the true owners from their money in the first place." Plaintiffs' Reply to Exxon's Memorandum Regarding Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment [D.E. # 1424], at p. 22.

Where the goals of the underlying statute(s) upon which the class claims are based are strictly compensatory, at least one circuit has recognized that a class action resulting in substantial unclaimed funds will not further that goal. *See Six (6) Mexican Workers*, 904 F.2d at 1306 ("Where the goals of the underlying statute are strictly compensatory, a class action resulting in substantial unclaimed funds will not further that goal."). Nor is such a fund appropriate to relieve the plaintiff class of the burden of proving individual damages. *See Nelson*, 802 F.2d at 409. But, where the statutory objectives include enforcement, deterrence or disgorgement, the class action may be the "superior" and only viable means to achieve these purposes, despite the prospect of unclaimed funds. *See Six (6) Mexican Workers*, 904 F.2d at 1306. Otherwise stated, the *cy pres* distribution of unclaimed funds is disfavored where it subjects defendants to greater liability or alters their substantive rights, unless there is a statutory purpose of deterrence or disgorgement. *See, e.g., In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir.1974) (rejecting an attempt to use fluid recovery or *cy pres* distribution to avoid

[12] While the Court cannot anticipate the exact magnitude of an unclaimed fund, Exxon estimates that it would represent approximately $125 million, which Plaintiffs do not contest.

the difficulty of proving each class members' specific injury because to do so would alter the defendants' substantive rights).

The Court concurs with Exxon that Plaintiffs' damages for breach of contract claims are limited, under the Uniform Commercial Code[13], to only compensatory damages, not consequential, special or punitive relief. By prior order, the Court denied Plaintiffs' claim for punitive damages. *See Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1326 (S.D.Fla.1999).

U.C.C. § 1-106(1) specifically provides that remedies for breach of contract are designed so that, "the aggrieved party [the individual dealer] may be put in as good a position as if the other party [Exxon] had performed." This provision also states unequivocally that, "neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law." *Id.* As the U.C.C.'s Official Commentary notes, this provision was intended "to make it clear that compensatory damages are limited to compensation," and that "[t]hey do not include consequential or special damages, or penal damages." U.C.C. § 1-106, Official Comment 1.

Thus, under U.C.C. principles, once all class members who assert valid claims are made whole, the compensatory purpose of any damage award has been completely satisfied. To the extent that any aggregate award exceeds the total amount of such damages, it no longer serves the compensatory purpose of damages relief under U.C.C. § 1-106 and becomes punitive in nature. Such an award would thereby violate Exxon's substantive rights under the Uniform Com-

[13] The Court has found, and the parties have agreed, that the law applicable to this cause is the Uniform Commercial Code, which has been uniformly adopted in all applicable jurisdictions, with the exception of Louisiana.

mercial Code and would be contrary to the Rules Enabling Act, which specifically provides that procedures under the Federal Rules of Civil Procedure, including Rule 23(b)(3), "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). *See In Re: Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir.1974) ("We agree with the decision reached in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir.1973), that allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights . . . . Such enlargement or modification of substantive statutory rights by procedural devices is clearly prohibited by the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure."). *See also Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2nd Cir.1983) (reaffirming the Second Circuit's rejection of "fluid" class recovery in antitrust class actions). *But see Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir.1990) (affirming award of "in gross" judgment in class action under Farm Labor Contractor Registration Act, distinguishing *Eisen* and *In re Hotel* on the basis that statutory, per-violation damages under Act—unlike antitrust or security damages—did not require individual proof of actual damages).

In addition to the problem of whether an in-gross award bypasses the need for individual proof of damage, there are serious questions as to whether an aggregate award of damages will significantly overstate the entitlement of the Class Dealers to those damages. The likelihood of potentially significant "unclaimed damages" from an aggregate or lump award, and the consequent punitive effect, is compounded in this case because of the very real possibility that the Court may lack subject matter jurisdiction over the claims of a number of putative class members.[14]

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[14] Notwithstanding the Circuit split, the Court stands by its "Order on Plaintiffs' Motion for Partial Summary Judgment Regarding Subject Matter Jurisdiction" [D.E. # 1122]. The Court's reasons are stated in *Leszczynski v. Allianz Ins. Co.*, 176 F.R.D. 659 (S.D.Fla.1997). A far better statement of the same reasons appears in *Poore v. American-Amicable Life Ins. Co. of Texas*, 125 F.Supp.2d 1378, 1382-1384 (S.D.Ga.2000), which I incorporate by reference.

Here, the Magistrate Judge, while recognizing that some plaintiffs exceed the minimum jurisdictional amount in this case, concluded that *Zahn* applies such that each plaintiff in a class action rounded on diversity must exceed the minimum jurisdictional requirements, but denied Exxon's motion to dismiss for lack of subject matter jurisdiction on other grounds. *See* D.E. # 338, p. 3. Judge Kehoe denied Exxon's objections without opinion. *See* D.E. # 362. Exxon has never disputed that some of the named plaintiffs and putative class members individually exceed the minimum jurisdictional requirements.

Here, each Dealer's breach of contract claim is based on diversity jurisdiction under 28 U.S.C. § 1332. Although the Court has previously ruled that it has supplemental jurisdiction under 28 U.S.C. § 1332, *see* July 1, 1999 "Order on Plaintiffs' Motion for Partial Summary Judgment Regarding Subject Matter Jurisdiction" [D.E. # 1122], the resolution of this issue in the Eleventh Circuit remains far from clear. In the event subject matter jurisdiction is lacking, the Court cannot include in an aggregate damage award those claims of class members over which it has no jurisdiction. To do so would expose Exxon to potential double liability in the event it is successfully sued in state court by a class member who is dismissed for lack of subject matter jurisdiction. Moreover, in the event of remand, untangling those class members who are included in a gross award, but who do not meet threshold jurisdictional amounts, will necessitate a second inquiry into the value of each dealer's claim if Plaintiffs' proposal is followed. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938) ("The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the

courts. . . . [I]f, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed."). Under Exxon's proposal, both inquires can be conducted simultaneously during the claims process.

Most recently, the Court of Appeals for the Eighth Circuit has ruled that 28 U.S.C. § 1367 does not overrule the Supreme Court's holding in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), and that every member of a class asserting state law claims must satisfy the minimum jurisdictional amount of the diversity statute. *See Trimble v. Asarco, Inc.*, 232 F.3d 946, 961 (8th Cir.2000). As a result of this decision, the Eighth Circuit now joins the Court of Appeals for both the Third and Tenth Circuits to form a majority of federal courts that have held that *Zahn* continues to govern subject matter jurisdiction of federal district courts in class action claims. *See Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3rd Cir.1999) and *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir.1998). While the Eleventh Circuit has recognized this split of authority, and the equal division of eight members of the United States Supreme Court on the issue, *see Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1262 n. 5 (11th Cir. 2000), it has not yet had occasion to announce its position on the issue.

In formulating a post-judgment procedure, this Court cannot discount the possibility that the Eleventh Circuit may align itself with the majority of the other Circuits by concluding that the 1990 amendments to 28 U.S.C. § 1367(a) did not overrule *Zahn* and extend supplemental jurisdiction to the claims of an entire class once the claim of at least one class member satisfies the requisite amount in controversy.

Under such circumstances, Exxon's argument that a lump sum award is inherently punitive, rather than compensatory, is enhanced, particularly when considered in light of Plaintiffs' further request to preclude Exxon from recovering any unclaimed funds remaining after the payment of all valid claims.

To summarize, the Court denies Plaintiffs' request that a final judgment be entered for the aggregate sum of the total damages, as adjusted. Rather, the Court shall direct the Clerk of Court to enter judgment in the manner set forth in Attachment A to this Order. In addition, the Court, by this Order, shall rule on all remaining outstanding issues affecting the claims administration process and request the Eleventh Circuit to review these matters before such an administration process is implemented.

III. *ISSUES AFFECTING THE CLAIMS ADMINISTRATION PROCESS*

The Court must establish and conduct a claims process whereby the named plaintiffs and putative class members can present their claims. Within that process there are certain discrete issues which will affect the extent of the claims that certain individual class members can make or recover and the manner by which such claims are calculated. These include:

1. Calculation of Individual Class Member Compensatory Damages.

The calculation of an award of compensatory damages to individual Class Dealers is straight-forward.[15] Compensatory damages to each dealer are mathematically derived from multiplying the cents per gallon damage award determined by

[15] For a more detailed discussion of the appropriateness of the compensatory award, see the discussion *infra*, at section III(4), pertaining to the award of prejudgment interest.

the jury in the Special Verdict times the total number of gallons of motor fuel purchased by that dealer over the period of March 1, 1983, until August 29, 1994, as established by Exxon's Dealer Volume Database on a store level basis, less reductions, if any, required based on statute of limitations in Ohio, and Category-four releases in Delaware.[16] Thus, the award of compensatory damages to an individual class member will involve: (i) identifying the station or stations at which the class member was a dealer; (ii) determining the time period during which the class member was a dealer at that station, and (iii) multiplying the gallons of motor fuel sold to that station during that period by the measure of damages applicable during that time period.

2. *Inclusion or Exclusion of Diesel Fuel Purchases In the Calculation of Compensatory Damages.*

The Court had previously reserved to consider Exxon's motion to exclude diesel fuel purchases from the computation of total motor fuel volumes. The issue that requires resolution is whether gallons of diesel fuel Exxon sold to the Dealers during Discount for Cash, as opposed to gallons of gasoline, are properly included within the class claims. The Court now concludes that diesel fuel purchases are to be included in the calculation of class members' compensatory damages.

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[16] See discussion in *Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667, 684 n. 26 (S.D.Fla.1999). In its "Response of Exxon Corporation in Opposition to Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment," Exxon contends that the Court made no ruling with regard to general releases that were entered during the period between "disclosure" and class certification. *See* D.E. 1416 at p. 22. The Court respectfully disagrees. These releases fall within the category of "pre-certification Releases," and, in light of the Special Verdict findings, may not be enforced.

Exxon contends that Plaintiffs should not be permitted to amend their claims to include diesel fuel because it was not adequately pled in the Plaintiffs' amended complaint. Under Fed.R.Civ.P. 15(b), a court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved and where the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party's defense upon the merits. *See Menendez v. Perishable Distribs., Inc.*, 763 F.2d 1374, 1379 n. 3 (11th Cir.1985); *Harris v. Garner*, 216 F.3d 970, 996 (11th Cir.2000) ("[U]nder Rule 15(b), courts should allow amendments to conform the pleadings to the evidence both during trial, and even after judgment, as long as the opposing party cannot prove that he is thereby prejudiced."). Both elements are met in this case.

The record unequivocally establishes that Plaintiffs' claims have consistently encompassed Exxon's pricing of both gasoline and diesel fuel. Exxon's Discount For Cash program applied to both gasoline and diesel fuel (collectively referred to by Exxon as "motor fuel"). At the close of the Plaintiffs' case during the first trial, the parties stipulated that the Plaintiffs were not required to offer separate proof of the manner in which Exxon priced diesel fuel, that a finding by the jury that Exxon breached a duty in pricing gasoline would constitute a finding of breach with respect to the pricing of diesel fuel, and that for purpose of computing and allocating damages on a cents per gallon basis, the combined volumes of gasoline and diesel would be used [Trial I Transcript, 8/20/00, pp. 3024-28].

At the second trial, all prior stipulations remained in effect [D.E. # 1264]. As a result, during the second trial, the Court admitted into evidence, without objection, Plaintiffs' Exhibit Number "1," which is a summary schedule of the Class Dealers' damages, computed on a cents per gallon basis using volumes of both gasoline and diesel fuel. The jury's award of

cents per gallon in the Special Verdict followed directly from the calculations reflected in this exhibit. Exxon has suffered no prejudice. It was well able to defend on the Plaintiffs' claim. Moreover, the merits of the cause would be subserved by not permitting the pleadings to be amended to conform to the evidence. Accordingly, Exxon's objection to the inclusion of diesel fuel is denied.

3. Application of Statutes of Limitation in Ohio and Florida.

The Court previously has found that Ohio and Florida do not recognize the fraudulent concealment doctrine as a legal avoidance to a statute of limitations defense. *See Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667, 672 (S.D.Fla. 1999). In its initial briefs, Plaintiffs reargued these matters based the application of a fifteen year statute of limitations in Ohio [Ohio Rev.Code Ann. § 2305.06], and a recent Florida Supreme Court decision which Plaintiffs claim has clarified the application of the fraudulent concealment doctrine with respect to that state's statute of limitations and requires a different result than originally determined by the Court. *See Allapattah Servs.*, 188 F.R.D. at 675 n. 16 (concluding under Florida law that a fraudulent concealment claim cannot "toll" the statute of limitations).

a. Ohio.

Since the filing of their initial briefs, Plaintiffs have conceded that the Ohio statute of limitations is applicable. Accordingly, gallons purchased by dealers residing in Ohio prior to May 1987 shall be excluded from the damage computation.

b. Florida.

Florida has a five year statute of limitations for breach of contract claims that does not recognize "tolling" for fraudulent concealment. *See* Fla. Stat. § 95.11(2)(b). Plaintiffs

claim that a recent Florida Supreme Court decision, *Hearndon v. Graham*, 767 So.2d 1179 (Fla.2000), has changed Florida law since the Court's prior opinion, and that its cause of action did not "accrue" until November of 1990 under the "delayed discovery doctrine."

In *Hearndon*, the Florida Supreme Court addressed the following certified question: "Where a plaintiff in a tort action based upon child abuse alleges that she suffered from traumatic amnesia caused by the abuse, does *Fulton County Admin. v. Sullivan*, 22 Fla. L. Weekly S578 (Fla.1997), preclude judicial recognition of an exception to or a tolling of the statute of limitations based upon the doctrine of delayed discovery recognized in Chapter 92-102, Laws of Florida?" In response, the Florida Supreme Court held that the delayed discovery doctrine applies to the "accrual" of the instant cause of action. *Hearndon*, 767 So.2d at 1180. The Court receded from past decisions that applied the delayed discovery doctrine to toll the running of a statute of limitations. *Id.* at 1184. It held that the Florida Statutes do not impede the delay of the accrual of the cause of action. *Id.* The Court also described the delayed discovery doctrine in this manner:

> The "delayed discovery" doctrine generally provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action. *See Hillsborough Community Mental Health Ctr. v. Harr*, 618 So.2d 187, 189 (Fla.1993); 35 Fla. Jur.2d Limitations and Laches § 60 (1996). The United States Supreme Court applied the "blameless ignorance" doctrine in *Urie v. Thompson*, 337 U.S. 163, 170, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), thereby delaying the accrual of a cause of action until the plaintiff reasonably discovered the right of action, reasoning that "the traditional purposes of statutes of limitations . . . require the assertion of claims within a specified period of time after notice of the invasion of

> legal rights." *Id.* This Court adopted the doctrine into Florida law as the "delayed discovery" doctrine. *City of Miami v. Brooks*, 70 So.2d 306, 309 (Fla.1954). *See Kush v. Lloyd*, 616 So.2d 415, 418 (Fla.1992); *Creviston v. General Motors Corp.*, 225 So.2d 331, 334 (Fla.1969) (explaining that the "accrual of the [underlying cause of action] must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights"). Thus, application of the delayed discovery doctrine to the accrual of a cause of action and, therefore, to the running of a statute of limitation is not new to Florida law.

Id. at 1183.

Plaintiffs claim that, under Florida's "delayed discovery doctrine," their cause of action did not accrue, and the statute of limitations did not begin to run, until the Plaintiffs knew, or reasonably should have known, of the act giving rise to the cause of action. *See id.* at 1184. Thus, in proving the elements of fraudulent concealment as found by the jury in the Special Verdict form, Plaintiffs claim that they also have established the identical elements which under Florida law would result in the non-accrual of their claim. In response, Exxon argues that *Hearndon* is limited to the particular tort claim involved and is inapplicable to accrual of breach of contract claims.

Plaintiffs arguments are persuasive that Florida law has changed since this Court's prior order addressing the issue. As a federal court sitting in diversity, I must apply the substantive law of the forum state. *Insurance Co. of N. Am. v. Lexow*, 937 F.2d 569, 571 (11th Cir.1991). While Exxon claims that *Hearndon* is narrowly limited, that position has been rejected by the Florida Fourth District Court of Appeals in *Monahan v. Davis*, 781 So.2d 436, 437 (Fla. 4th DCA 2001) ("Appellees argue that the delayed discovery doctrine does not apply to the causes of action here at issue . . . This

narrow view of the delayed discovery doctrine is at odds with . . . *Hearndon* . . . ."). The appellate court stated that "[T]he supreme court's discussion of the delayed discovery doctrine demonstrates that it is rooted in the common law, not created by statute." *Id.* at 438. It further stated: "*Hearndon* held that the delayed discovery doctrine, when properly applied, operates to delay the *accural* of a cause of action." *Id.*

While *Monahan* admittedly did not apply to a contract claim based on common law, its analysis lends support to the argument that the Florida Supreme Court would reach the same conclusion even if contract claims were involved. *See Insurance Co. of N. America*, 937 F.2d at 571 (in applying state law, district court is to adhere to the decisions of the state's intermediate appellate courts absent some persuasive indiction that the state's highest court would decide the issue otherwise). Otherwise stated, Florida's "delayed discovery doctrine" would apply here in that, based on the jury's Special Verdict, the Plaintiffs did not know, nor reasonable should have known, of the breach of contract claim giving rise to the cause of action until November of 1990. [*See* D.E. # 1395, p. 15 (finding that the Dealers did not learn, or had sufficient facts to raise a suspicion and a duty to investigate that they had a claim against Exxon, until November 1990)].

4. Entitlement to Prejudgment Interest.

The Court and the parties have recognized the complexity of the prejudgment interest problem in this case. Prior to trial, the Court addressed the matter of prejudgment interest to the extent practicable in *Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667 (S.D.Fla.1999). There, the Court surveyed the law on prejudgment interest in the political jurisdictions in which Exxon dealers conducted business during the Class Period, and concluded: (1) the Plaintiffs'

claims are liquidated[17]; (2) prejudgment interest is awarded as a matter of right in 29 of the 36 jurisdictions [Alabama, Arizona, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland[18], Massachusetts, Montana, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Washington[19], West Virginia, and Wyoming[20]]; (3) in all but three of

[17] The Court concluded that in the jurisdictions in which prejudgment interest is awarded as a matter of right, the damages must be liquidated in nature. Based on the evidence presented at that time, the Court determined that Plaintiffs' breach of contract damages were liquidated, but reserved to issue a final ruling on this matter at the conclusion of trial. *Allapattah Servs.*, 188 F.R.D. at 685 n. 29.

[18] For entitlement to prejudgment interest as a matter of right in Maryland, there must be an obligation to tender a certain sum upon a certain date. *See Allapattah Servs.*, 188 F.R.D. at 686 n. 32 [citation omitted]. Here, the jury found that Exxon failed to reduce the wholesale price of its motor fuel to offset its 3% fee to its Class dealers from March of 1983 through August of 1994 [D.E. # 1395, pp. 10 & 11]. This finding is sufficient to permit prejudgment interest as a matter of right in Maryland, since Exxon failed to reduce prices by a sum certain on dates certain.

[19] In Washington, although entitlement to prejudgment interest on liquidated claims is a matter of right, a trial court, in its discretion, may reduce or disallow such interest upon a finding that the plaintiff unreasonably delayed in prosecuting a claim. *See Allapattah Servs.*, 188 F.R.D. at 686 n. 33 [citation omitted]. Here, the jury found by its Special Verdict that the Class Dealers learned, or their representatives had sufficient facts to raise a suspicion, and a duty to investigate, as of November of 1990 [D.E. # 1395, p. 15]. Based on this finding, there is no basis to reduce or disallow prejudgment interest on the ground that Plaintiffs unreasonably delayed prosecuting their claims.

[20] Applying Wyoming law, Class Dealers in that state would be entitled to prejudgment interest as a matter of right within the Class Period from the earliest date when each Class Dealer purchased motor fuel from Exxon since each such dealer was entitled to a reduction on that date and was deprived of the beneficial use of the money. *See Allapattah Servs.*, 188 F.R.D. at 686 n. 34 (citations omitted).

the above stated jurisdictions [Arizona, Maine, and New Hampshire], interest accrues from the date of the breach[21], and in the remaining three jurisdictions, it runs from the date of filing the complaint [*i.e.*, May 13, 1991]; (4) in seven jurisdictions [Connecticut, Indiana, Mississippi, New Jersey, New Mexico, Tennessee, and Virginia], interest is discretionary, requiring the presentation of evidence in support of entitlement; (5) in those jurisdictions, the court decides whether the Plaintiffs' are entitled to prejudgment interest [in one jurisdiction, Virginia, the issue is for the jury, but Exxon has waived a jury determination on this issue. *See* Trial I Transcript, 8/18/99, at pp. 2615/24-2616/1]; (6) in some of these remaining states the time of accrual of the right to prejudgment interest is specified by statute, and in others it is for the court's determination; and (7) the parties would be required to provide further details as to the applicable prejudgment interest rates of the various states during the years at issue.

In its post-verdict submissions, Exxon has raised further challenges. Exxon contends that the Plaintiffs are not entitled to prejudgment interest as a matter of right in any state because: (1) there is no basis to determine the amount of "damages" subject to each state's prejudgment interest; and (2) the Plaintiffs' damages are not liquidated.[22] Where the Court has discretionary jurisdiction, Exxon further argues that

[21] For discussion of how prejudgment interest would be calculated from the date of breach, see sections III(4)(a) and III(5) of this order, *infra*.

[22] Exxon also argues that the Court should not award prejudgment interest with respect to dealers who do not submit claims or to those class members over which the Court lacks subject matter jurisdiction. For reasons stated above, the Court concurs with Exxon that prejudgment interest may only be awarded to class members who submit claims. Moreover, if, upon further appellate review, it is determined that compensatory damages may not be awarded to class members who do not individually meet requisite diversity monetary requirements, then prejudgment interest cannot be awarded to those class members either.

the periods for any consideration of prejudgment interest should be limited, and, in any event, that the law of the seven discretionary states would not permit a discretionary award. Each issue is addressed separately below.

a. Exxon's claim that prejudgment interest should not be awarded because there is no basis to determine the amount of damages subject to each state's prejudgment interest rate.

Exxon contends that there is no evidence in the trial record (much less a jury finding) that dealers in any particular state were in fact overcharged (or if so, the amount of the overcharge). The Court disagrees. The record contains competent, substantial evidence upon which the jury's determination of a damage factor was based, and upon which the jury could reasonably rely.

When monetary relief is sought, and when data from each class member is required to assess individual recovery entitlement, it is appropriate for the class representatives to develop and prove common guidelines or formulae that will apply to determine the measure of recovery for each individual proof of claim. *Newberg On Class Actions*, § 10.01 (3d ed.1992). As noted in *Newberg:*

> Formulae for individual measurement of damages are most frequently found in securities fraud actions and in antitrust actions for price-fixing violations. Similar guidelines for individual measure of monetary relief are found in employment discrimination and other civil rights class actions. There are occasions when it is feasible and reasonable to prove aggregate monetary relief for the class from an examination of the defendant's records, or by use of a common formula or measurement of damages multiplied by the number of transactions, units, or class members involved, or by reasonable approximation with proper adherence to recognized evidentiary standards.

Id.

The case law supports the calculation of compensatory damages [to which prejudgment interest will apply] through a common mathematical factor in a class context. *See Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir.1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1605, 56 L.Ed.2d 58 (1978) (if damages are capable of formula calculations, no manageability problem exists even though individual claims may exist); *Brown v. Pro Football, Inc.*, 146 F.R.D. 1, 5 (D.D.C.1992) (finding no manageability problem because the calculation of individual damages may be made by simple common formula); *Walsh v. Pittsburgh Press Co.*, 160 F.R.D. 527, 531 (W.D.Pa.1994) (determination of amount of recovery for each employee class member will be based on a manageable mathematical formula); *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-86 (9th Cir.1996) (calculation of damages through random statistical sampling techniques affirmed, although court noted: "While the district court's methodology in determining valid claims is unorthodox, it can be justified by the extraordinarily unusual nature of this case.").

Here, Plaintiffs' proof of aggregate monetary damages [based on a finding of cents per gallon] was feasible and appropriate under the unique and highly unusual circumstances of this case. The proof was sufficiently reliable to permit a just determination of Exxon's liability within recognized standards of admissible and probative evidence in response to what Exxon, itself, represented to the Class Dealers.

To paraphrase the United States Supreme Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250-51, 75 L.Ed. 544 (1931) (an antitrust treble-damage action), where the breach itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. *In such case, while the damage may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damage as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.*" (emphasis added).

Based on their proof of the aggregate damage factor, as determined by the jury, there is ample basis for the Court to exercise its discretion to award prejudgment interest to individual Class Dealers who file verifiable claims arising in the discretionary states involved. The Court hereby so finds. Exxon had a good faith obligation to its dealers during the Class Period to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit card recovery fee during the Class Period [*See* D.E. # 1395, Special Verdict, p. 3]. Exxon's good faith obligation, by its very terms, was made to each dealer, and the class as a whole, regardless of whether that dealer utilized the discount for cash program. The jury found that Exxon failed to live up to this obligation. *Id.* at p. 5. The proof at trial was that, in March of 1983, in accordance with its secret business plan, Exxon took back in its entirety the offset it had initially provided, and never provided the offset again. Thus, after March of 1983, no

dealer in any market at any time received any Discount For Cash offset whatsoever. This leaves the calculation of damages certain in amount, time[23] and location.[24]

It is now equitable to compensate the class dealers for lost earnings on a sum of money to which they were entitled. *See Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667, 687 (S.D.Fla.1999) (recognizing that "the equitable purpose of prejudgment interest is to compensate a party for lost earnings on a sum of money to which it was entitled, but which has been retained by another") (citation omitted). The damage against which to apply each state's prejudgment interest rate is to be determined by multiplying the amount of the annual cents per gallon factor, as determined by the jury, by the volume of Exxon's sales to individual dealers in that state who submit verified claims, less any reductions required by virtue of statute of limitations in Ohio and Category-4 Releases in Delaware.

b. Exxon's claim that the Court should not award prejudgment interest because Plaintiffs' damage claims are not liquidated.

Exxon contends that there is no evidence in the trial record to conclude that Plaintiffs' damages are liquidated on an individual or class basis. The Court disagrees. Plaintiffs' damage claim is in fact subject to mathematical computation without reliance on opinion or discretion. It is the total amount of damages suffered by the class as a whole; that is, the total dollars Exxon collected through the 3% fee. Exxon alone controlled the documents which made the calculation ascertainable with mathematical certainty and from which

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[23] Plaintiffs established, and the jury found, damages on an annual cents per gallon basis because this was the shortest period of time that Exxon's business records reported credit cost recovery fee revenue.

[24] Exxon's dealer volume database allows motor fuel volumes to be segregated on a state by state basis.

Exxon itself could have made a proper tender with reasonable certainty. The jury verdict establishing a "cents per gallon" damage factor now makes the application of damages mathematically precise to individual dealers based on volumes purchased. The combination of these factors satisfies the requirements in every jurisdiction with respect to the Plaintiffs' entitlement to prejudgment interest. *See Alfa Mut. Ins. Co. v. Beard*, 597 So.2d 664, 666-67 (Ala.1992) (liquidated where damages are reasonably ascertainable at time of breach, measured by fixed or established external standard, or by standard apparent from documents upon which plaintiffs based their claim); *Schade v. Diethrich*, 158 Ariz. 1, 760 P.2d 1050, 1063 (1988) (*en banc*) (liquidated where the evidence furnishes data which makes it possible to compute the amount of claim with exactness, without reliance upon opinion or discretion); *Woodline Motor Freight, Inc. v. Troutman Oil Co., Inc.*, 327 Ark. 448, 938 S.W.2d 565, 568 (1997) (prejudgment interest where the amount of damages is liquidated as a dollar sum, or if damages are definitely ascertainable by mathematical computation, or if the evidence furnishes data that makes it possible to compute the amount without reliance on opinion or discretion); *Segura v. McBride*, 5 Cal.App.4th 1028, 7 Cal.Rptr.2d 436, 444 (1992) (liquidated, as codified in Cal. Civ.Code § 3287, where damages are certain or capable of certainty through calculation); *Rotenberg v. Richards*, 899 P.2d 365, 367-68 (Colo.Ct.App.1995) (liquidated where contract sets forth method for determining amount due); *Four D's Inc. v. Mattera*, 1990 WL 290083, *3 (Conn.Super.Ct.1990), *aff'd*, 25 Conn.App. 308, 594 A.2d 484 (1991) (liquidated where claim is for an amount certain or susceptible of being made certain by mathematical calculations from factors which are or ought to be in possession or knowledge of the party to be charged); *Jarrell v. Delchester Oil Co.*, 1993 WL 189495, *1 (Del.Super.Ct.1993) (prejudgment interest where damages are liquidated or where amount of recovery is calculable);

District of Columbia v. Pierce Assocs., Inc., 527 A.2d 306, 311 (D.C.1987) (liquidated where claim is an easily ascertainable sum certain at time it arises); *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212, 215 (Fla.1985) (claim is liquidated and entitled to prejudgment interest if claimant has obtained verdict for out-of-pocket pecuniary loss); *Holloway v. State Farm Fire & Cas. Co.*, 245 Ga.App. 319, 537 S.E.2d 121, 124 (2000) (liquidated where amount is certain and fixed, either by the act and agreement of the parties or by operation of law); *Thor Elec., Inc. v. Oberle & Assocs.*, 741 N.E.2d 373, 377 (Ind.Ct.App.2000) (no liquidated distinction, but prejudgment interest allowed where damages are ascertainable in accordance with fixed rules of evidence and where only a simple mathematical calculation is required)[25]; *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky.1991) (liquidated where damages are made certain or fixed by agreement of parties or by operation of law); *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 657 So.2d 282, 315 (La.Ct.App.1995) (no liquidated distinction, but prevailing party is entitled to interest from date of breach if amount due is ascertainable); *Osgood v. Osgood*, 698 A.2d 1071, 1073 (Me.1997) (no liquidated distinction, but prejudgment interest to compensate an injured party for the inability to use money rightfully belonging to that party between the date suit is filed and the date judgment is entered); *United Cable Television of Baltimore Ltd. P'ship v. Burch*, 354 Md. 658, 732 A.2d 887, 894-95 (1999) (liquidated where claim is a sum certain); *Weiss v. Augat, Inc.*, 2000 WL 1765434, *4 (Mass.Super.2000) (no liquidated distinction; prejudgment interest given as of right where

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[25] Some states do not expressly classify damages as liquidated or unliquidated, but look to similar considerations such as whether the damages are readily ascertainable by mathematical calculation. *See, e.g., Close v. Isbell Constr. Co.*, 86 Nev. 524, 471 P.2d 257, 260 (1970); *Reliable Water Co. v. Monroe Township Mun. Utils. Auth.*, 146 N.J.Super. 291, 369 A.2d 949, 950-51 (App.Div.1977).

necessary to compensate a party for the loss of the use of his money and in order to make the party whole); *Simpson v. State Farm Fire and Cas. Co.*, 564 So.2d 1374, 1380-81 (Miss.1990) (liquidated where certain or capable of being made certain by mere calculation); *Kelleher Law Office v. State Comp. Ins. Fund*, 213 Mont. 412, 691 P.2d 823, 826 (1984) (liquidated where claim is capable of ascertainment by reference to an agreement or simple mathematical calculation); *Close v. Isbell Constr. Co.*, 86 Nev. 524, 471 P.2d 257, 260 (1970) (no liquidated distinction, but prejudgment interest where value of contract is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices); *McLaughlin v. Union-Leader Corp.*, 100 N.H. 367, 127 A.2d 269, 271 (1956) (no liquidated distinction, but prejudgment interest where money was due but unpaid); *Reliable Water Co. v. Monroe Township Mun. Utils. Auth.*, 146 N.J.Super. 291, 369 A.2d 949, 950-51 (1977) (liquidated where sum certain can be determined from formula even where obligation is disputed); *Bachman Chocolate Mfg. Co. v. Lehigh Warehouse & Transp. Co.*, 1 N.J. 239, 62 A.2d 806, 808 (1949) (interest allowed where damages are readily ascertainable or where amount of loss is ascertainable by a fixed standard forming a rational basis for the computation); *Lucero v. Aladdin Beauty Colls., Inc.*, 117 N.M. 269, </proga@dd>871 P.2d 365, 368 (1994) (liquidated where fixed and ascertainable); *Gunnarson v. State*, 70 N.Y.2d 923, 524 N.Y.S.2d 396, 398, 519 N.E.2d 307 (1987) (liquidated where damages are fixed, but prejudgment interest regardless of whether claim is liquidated); *Lazenby v. Godwin*, 60 N.C.App. 504, 299 S.E.2d 288, 291 (1983) (liquidated where amount of claim is obvious or easily ascertainable); *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 652 N.E.2d 687, 690-91 (Ohio 1995) (liquidated where damages are capable of ascertainment by reasonably certain calculations, or debts of a sum certain); *Erickson Hardwood Co. v. North Pacific Lumber Co.*, 70

Or.App. 557, 690 P.2d 1071, 1079 (1984) (liquidated where damages are ascertainable by simple calculation or by reference to generally recognized standards such as market price); *Burkholder v. Cherry*, 414 Pa.Super. 432, 607 A.2d 745, 748 (1992) (liquidated where amount due is ascertainable); *Enterprise Garnetting Co. v. Forcier*, 69 R.I. 455, 35 A.2d 1, 5 (1943) (liquidated where obligation to pay a sum certain at a fixed time); *Builders Transport, Inc. v. South Carolina Prop. and Cas. Ins. Guaranty Ass'n.*, 307 S.C. 398, 415 S.E.2d 419, 424 (App.1992) (liquidated where damages are certain or capable of being reduced to a certainty); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 928 (Tenn.1998) (prejudgment interest where liquidated claim for fixed amount or where amount of damages is ascertainable by computation or by any recognized standard of valuation); *State Farm Fire and Cas. Ins. Co. v. Vandiver*, 970 S.W.2d 731, 746 (Tex.App.1998) (liquidated where there is an ascertainable sum payable); *Estate of Fleming v. Nicholson*, 168 Vt. 495, 724 A.2d 1026, 1031 (1998) (liquidated where damages are readily ascertainable or where they can be calculated from established market prices); *Gill v. Rollins Protective Servs. Co.*, 836 F.2d 194, 198 (4th Cir.1987) (applying Va. law) (no liquidated distinction; prejudgment interest to fully compensate plaintiff for delay in payment of money); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 15 P.3d 115, 132 (2001) (*en banc*) (liquidated where evidence furnishes data which makes it possible to compute the amount due with exactness); *Hardman Trucking, Inc. v. Poling Trucking Co., Inc.*, 176 W.Va. 575, 346 S.E.2d 551, 556 (1986) (prejudgment interest may be awarded on ascertainable pecuniary losses that are certain or capable of being rendered certain by reasonable calculation); *Millheiser v. Wallace*, 21 P.3d 752, 755 (Wyo.2001) (liquidated where amount due is readily computable by simple mathematical calculation).

c. Exxon's contention that the laws applicable to an award of discretionary interest in seven states, namely, Connecticut, Indiana, Mississippi, New Jersey, New Mexico, Tennessee, and Virginia, preclude such an award in those states.

For reasons stated above, the Court respectfully disagrees with Exxon's position and concludes that, as a matter of discretion, prejudgment interest should be awarded in each of the seven states. The following discussion further clarifies this conclusion with respect to the specific state law involved.

i. Connecticut.

Applying Connecticut law, the Court concludes that Exxon's detention of the monies which should have been credited to the Class Dealers throughout the Discount For Cash program was wrongful; that the amount was liquidated, and, based on the jury's findings, the Class Dealers diligently presented their claims. *See Brandewiede v. Emery Worldwide*, 890 F.Supp. 79, 83 (D.Conn.1994). As acknowledged by Exxon, the date of accrual is within the Court's discretion. *Sears Roebuck and Co. v. Bd. of Tax Review of the Town of West Hartford*, 241 Conn. 749, 699 A.2d 81, 89 (1997). Accrual should begin sometime after the money was wrongfully withheld. *Spearhead Constr. Corp. v. Bianco*, 39 Conn.App. 122, 665 A.2d 86, 93 (1995). Taking all the equities into consideration, the Court holds that prejudgment interest shall accrue from the date of the breach. The earliest date of breach would be March 1, 1983, depending on when each Connecticut Class Dealer's contract with Exxon was in effect, and when the Class Dealer commenced to purchase motor fuel under that contract. Thus, if the first contract was in effect on January 1, 1984, but motor fuel was not purchased until January 15, 1984, the date of breach would be January 15, 1984. Of course, each class dealer must establish the beginning date of its contract(s) with Exxon during the Class Period, the dates the contract(s) were in effect during

the Class Period, and the total gallons of motor fuel purchased under the contract(s) on a yearly basis. This is the same calculation necessary to determine compensatory damages. Once compensatory damages are determined for the Class Period, the prejudgment interest rate would apply to that sum on a year-by-year basis through the date of Final Judgment. For instance, if a class dealer in Connecticut entered the first of a series of contracts with Exxon during the Class Period on January 1, 1984, and purchased motor fuel from January 15, 1984, through August 30, 1994 [the conclusion of the DFC program], the prejudgment interest rate would apply on a yearly basis to compensatory damages and then would apply on the aggregate compensatory sum through the date of Final Judgment. The Final Judgment would be entered for the total compensatory damages and prejudgment interest for that Class Dealer.

ii. Virginia.

Exxon contends that Virginia does not ordinarily allow prejudgment interest when claims are unliquidated and disputed between the parties. *Skretvedt v. Kouri,* 248 Va. 26, 445 S.E.2d 481 (1994). While this may be so, this Court has determined that the claims are liquidated. It is within the Court's discretion under Virginia law to award interest in order to make the dealers whole for the loss sustained by not receiving the money at the time it was initially due. *See Ragsdale v. Ragsdale,* 30 Va.App. 283, 516 S.E.2d 698, 702 (1999).

iii. Indiana.

Again, since the Court has found the claims to be liquidated and ascertainable, prejudgment interest is permitted under Indiana law. It is within the Court's discretion under Indiana law to fully compensate the dealers for the loss

suffered in being deprived of the use of the money Exxon owed to them. *See Abex Corp. v. Vehling*, 443 N.E.2d 1248, 1259-60 (Ind.Ct.App.1983).

iv. Mississippi.

In Mississippi, the award of prejudgment interest is normally left to the discretion of the trial court. *Warwick v. Matheney*, 603 So.2d 330, 342 (Miss.1992). Prejudgment interest may be allowed in cases where the amount due is liquidated when the claim is originally made or when the denial of a claim is frivolous or in bad faith. *Id.* Furthermore, Mississippi acknowledges the judicial authority to award the prevailing party prejudgment interest in breach of contract suits. *Sunburst Bank v. Keith*, 648 So.2d 1147, 1153 (Miss. 1995). As noted above, the claims in this case were liquidated, and it is in the interests of justice to award the Plaintiffs liquidated damages in order to make them whole. It is therefore appropriate to award prejudgment interest to the Mississippi Class Dealer's from the date of filing of the Complaint. *Id.* (acknowledging that, pursuant to Miss.Code Ann. § 75-17-7, prejudgment interest may not be awarded prior to the filing of the complaint).

v. New Jersey.

The parties agree that under New Jersey law, the Court has broad discretion to grant or deny prejudgment interest on contract claims in accordance with principles of equity and the goal of compensating the plaintiffs' for lost interest. *See Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1070 (1988); *Rova Farms Resort Inc. v. Investors Ins. Co. of Amer.*, 65 N.J. 474, 323 A.2d 495, 512 (1974); *Musto v. Vidas*, 333 N.J.Super. 52, 754 A.2d 586, 597 (App.Div.2000). The primary consideration in awarding prejudgment interest is that "the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for

the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled." *Rova Farms*, 323 A.2d at 512. The court's discretion with respect to the award also extends to the time interest accrues and the rate to be applied. *Musto*, 754 A.2d at 598.

Under New Jersey law, the Court concludes that Exxon's detention of the monies due and owing to the Class Dealers throughout the DFC program was wrongful, and that prejudgment interest should be awarded from the later of March 1, 1983, or when the New Jersey Class Dealer in question first purchased motor fuel under a DFC contract with Exxon (*see* discussion of Connecticut law above).

vi. New Mexico.

New Mexico Statute § 56-8-3[26] allows prejudgment interest in cases on money due by contract, money received to the use of another and retained without the owner's consent, and money due on the settlement of matured accounts. The obligation to pay prejudgment interest under § 56-8-3 arises by operation of law and constitutes an obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor between the time the claimant's claim accrues and the time of judgment (the loss of use and earning power of the claimant's

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[26] Section 56-8-3 provides:

> The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually in the following cases:
>
> A. on money due by contract;
>
> B. on money received to the use of another and retained without the owner's consent expressed or implied; and
>
> C. on money due upon the settlement of matured accounts from the day the balance is ascertained.

funds). *See Economy Rentals, Inc. v. Garcia*, 112 N.M. 748, 819 P.2d 1306, 1320 (1991). Prejudgment interest is awarded as a matter of right only when a party has breached a duty to pay a definite sum of money or "the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices." *Smith v. McKee*, 116 N.M. 34, 859 P.2d 1061, 1063 (1993) (*quoting Kueffer v. Kueffer*, 110 N.M. 10, 791 P.2d 461, 463 (1990)). In cases falling under § 56-8-3, where the amount owed is not fixed or readily ascertainable, the trial court may in its discretion award prejudgment interest of not more than fifteen percent. *Aztec Well Servicing Co. v. Property & Cas. Ins. Guar. Ass'n*, 115 N.M. 475, 853 P.2d 726, 737 (1993).

In this case, the claims of the Class Dealers are liquidated and ascertainable, and prejudgment interest is due and owing as a matter of right. *See Grynberg v. Roberts*, 102 N.M. 560, 698 P.2d 430, 432 (1985) ("where the amount of indebtedness under the contract is ascertainable by the breaching party, the injured party is entitled to interest as a matter of right on those monies at the legal rate"). Furthermore, even if they were not, the equities weigh in favor of granting prejudgment interest to the Class Dealers in order to compensate them for the loss of the use and earning power of their money. Interest is due from the date payments first became due, which in this case is the later of March 1, 1983, or when the New Mexico Class Dealer in question first purchased motor fuel under a DFC contract with Exxon.

vii. Tennessee.

Under Tennessee law, the award of prejudgment interest is within the sound discretion of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn.1998). Principles of equity guide this determination, and the court must determine whether the award of prejudgment interest is fair, given the particular facts of the case. *Id.* The purpose of the

award of interest is to fully compensate the plaintiff for the loss of the use of the funds to which he or she was legally entitled. *Id.* Courts also consider whether the amount of the obligation is certain, or can be ascertained by a proper accounting, whether the amount is disputed on reasonable grounds, and whether the existence of the obligation itself is disputed on reasonable grounds, but these factors are not dispositive. *Id.*

As noted above, the claims in this case are liquidated and readily ascertainable, and equitable principles weigh in favor of granting prejudgment interest to the Class Dealers to compensate them for the loss of the use of the funds to which they were legally entitled. Pursuant to Tenn.Code Ann. § 47-14-109(c),[27] interest began accruing from the day when the debt became payable, which in this case is the later of March 1, 1983, or when the Tennessee Class Dealer in question first purchased motor fuel under a DFC contract with Exxon.

5. Determination of Prejudgment Interest Rates and Accrual Dates.

In order to calculate the amount owed to individual class members in the various states, it is necessary to specify, for each jurisdiction, the applicable rate or rates of interest from the accrual date from which interest may run, whether the

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[27] Tenn.Code Ann. § 47-14-109(c), entitled 'When interest accrues,' provides:

> (a) Interest on negotiable and nonnegotiable instruments shall accrue according to the terms of the instrument; otherwise, interest on the instrument shall accrue as provided in § 47-3-112.
>
> (b) Liquidated and settled accounts, signed by the debtor, shall bear interest from the time they become due, unless it is expressed that interest is not to accrue until a specific time therein mentioned.
>
> (c) In all other cases, the time from which interest is to be computed shall be the day when the debt is payable, unless another day be fixed in the contract itself.

interest is simple or compounded within the jurisdiction, and any other unique rules in each jurisdiction relating to the manner of computation of interest.[28] Plaintiffs have previously filed and served a schedule reflecting their view, on a jurisdiction-by-jurisdiction basis, of the appropriate rate of interest and the manner of interest calculation, citing to the Court the appropriate authorities for those views [D.E. # 1410]. Within 15 days from the date of this Order, Plaintiffs will supplement their schedule, as they deem appropriate, in a manner consistent with this Order. Thereafter, Exxon, within 30 days from the entry of this Order, shall file and serve a pleading identifying any disagreements with the interest calculation schedule provided by Plaintiffs. Within 10 days of service, Plaintiffs shall file any additional materials they believe are appropriate regarding the rate and method of calculating prejudgment interest in each jurisdiction. Exxon will have 5 days to reply thereto. In the event any discovery is required, the parties shall so specify with particularity in their pleadings.

The Court shall reserve consideration of the interest rate issue until it is determined if differences exist and if discovery is requested. Ultimately, the Court will enter an

[28] For instance, under Conn. Gen.Stat. § 37-3, the maximum interest rate is 10% per annum. The Court has the discretion to set a lower rate. *Sears Roebuck and Co.*, 699 A.2d at 89. In the absence of a specific requirement of a particular rate of interest, Exxon argues that the rate should be the one used for judgment found in 28 U.S.C. § 1961. Those rates are based upon the percentage investment yield on 52-week treasury bills and reflect the value of money during the applicable time period. Interest is to be computed daily until the date of payment and compounded annually. 28 U.S.C. § 1961(b). According to Exxon, using these rates will serve the purpose of "compensating" Connecticut plaintiffs for the lost use of money owed on their claims. In addition, in the absence of a state specific rate, as a national class action, Exxon argues it is appropriate to use this federal rate. The Court shall resolve all such matters on a state-by-state basis once the parties final positions are briefed.

order making findings as to the applicable interest rate and the rules of applying interest in each jurisdiction involved in this matter. In that regard, Exxon has argued that, in the absence of a specific requirement of a particular rate of interest, the rate should be based upon the percentage investment yield on 52-week treasury bills and reflect the value of money during the applicable time period. It is premature for the Court to rule on this matter at this time. The Court reserves to do so upon the completion of the parties' submissions.

IV. *THE CLAIMS ADMINISTRATION PROCESS*

The Court must now proceed with a claims administration process that will consist of a notice, a claims period, a process verification of claims, and entry of a Final Judgment, or series of Final Judgments applicable to distinct sub-classes of putative members in accordance with Fed.R.Civ.P. 54(b),[29] and actual distribution.

A. Opt Outs.

Plaintiffs advise that the vendor retained for purposes of publishing the notice of class certification received notices from 61 persons who may be members of the class who chose not to participate in the outcome. Plaintiffs filed and served a schedule of all dealers who have potentially opted out and have provided to Exxon all documents received. Within 15 days from the date of this Order, Exxon will be required to identify if they have any objections to the opt out list. If differences exist, the Court will thereafter determine the matter.

[29] For instance, one final judgment could be entered as to all putative class members whose claims are undisputed by Exxon, while disputed claims proceed through the remainder of the claims administration process.

B. Claims Handling Process; Coordination with Clerk of Court.

Within 15 days from the date of this Order, the Clerk of the Court, or his designee, shall meet with the parties to develop a process for the filing, handling, and administration of the individual class members' claims. Within 30 days thereafter, the Clerk of the Court shall submit to the Court his proposed procedures for the handling of individual class member claims. The parties shall have 15 days after service in which to file any objections or counter-proposals.

C. Class Notice and Related Matters.

The parties shall meet and confer within 15 days from the date of this Order concerning the form and manner of notice to be provided to class members to start the claims process, the time within which class members shall submit their claims, and the time period within which Exxon may file objections to claims [consistent with this Order]. The notice should include a claim form and information concerning what supporting documents or data is to be supplied with the claim. Each claim shall be notarized and should include proof that the person or entity submitting the form was an Exxon dealer during the class period; proof that the person or entity submitting the claim has the capacity to sue;[30] the identity of the station or stations at which the claimant was an Exxon dealer; and the period of time at which such claimant was an

[30] There may be disputes between dealers as to who owns the claim for a particular station. In order to resolve the disputes, each class member submitting a claim must show he or she is the real party in interest with regard to the Sales Agreements on which the claim is based. For example, a dealer who sells or assigns his rights under a Sales Agreement to a new dealer may (or may not) have reserved any claims he or she has in this litigation. If so, it ultimately will be necessary to determine which dealer is the owner of the claim under that Sales Agreement.

Exxon dealer at each station.[31] To the extent there is no agreement, the parties shall submit their proposals within 15 days. The Court reserves to resolve any disagreements between the parties as to these matters.

D. Exxon's Participation in the Claims Administration Process.

1. Exxon' claim to right of set-off.

A set-off is a permissive counterclaim. *See* 3 James Wm. Moore *et al.*, Moore's Federal Practice, § 13.31 (3d. ed.2001). In a class action, it may be filed during the claims administration process solely to defeat or diminish the amount of a class member's recovery, but may not exceed the amount of the claim. *Id.*

Here, Exxon claims potential set-offs relating to unpaid motor fuel charges, unpaid rent, and the like. While a court ordinarily must have an independent basis for subject matter jurisdiction over permissive counterclaims, there is a well-recognized exception to this requirement in the case of a permissive counterclaim that is interposed defensively by way of set-off solely to defeat or reduce a plaintiff's recovery but which does not seek affirmative relief. *See* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1422 (2d ed.1990); *Herrmann v. Atlantic Richfield Co.*, 72 F.R.D. 182, 185 (W.D.Pa.1976) ("[S]et-offs, employed defensively . . . fall within the 'defensive set-off' exception to Rule 13(b) and may be asserted in the federal forum despite the absence of an independent jurisdictional basis."); *Kedziora v. Citicorp Nat'l Servs., Inc.*,

[31] For example, two dealers may have been dealers at the same station during a particular year. To avoid duplicative recovery, it will be necessary to determine the precise dates during which each was a dealer at that station. Because Exxon's station records only contain monthly data on fuel volumes, there also may be disputes between such dealers over the particular gallonage to which each is entitled.

901 F.Supp. 1321, 1332 (N.D.Ill.1995) ("A defensive set-off, unlike a permissive counterclaim, 'does not need independent jurisdictional grounds even though the claim is unconnected with the transaction or occurrence on which the main claim is based.'") (citation omitted); *Curtis v. J.E. Caldwell & Co.*, 86 F.R.D. 454, 457 (E.D.Pa.1980) ("Assertion of a defensive set off is the one generally recognized exception to this rule that a permissive counterclaim requires an independent basis for jurisdiction."). For this reason, the Court has jurisdiction to hear Exxon's set-off claims. Even if Plaintiff is correct that this longstanding exception may no longer be in effect after the adoption of the supplemental jurisdiction statute, 28 U.S.C. § 1367, the Court would exercise its discretion to hear them in order to assure due process, equity, and fair play. Any argument relative to bar by virtue of applicable statutes of limitation is premature.

Although the Plaintiffs contest Exxon's right to file set-offs, virtually every court to consider the issue has concluded that the appropriate time to assert counterclaims against individual class members is during the damage phase of the case. [*See* discussion below]. Where, as here, the calculation of each class member's individual damages has yet to occur, the time to consider any claim of set-off is during the claims administration process. As a practical matter, the claims administration process is the first time at which there is any meaningful opportunity to assert rights of set-off against individual class members.

The leading case on the proper procedure for handling offsets against individual class members is *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 485 (S.D.N.Y. 1973). There, a group of grocers sued several bakers alleging a conspiracy to fix the price of bread in New York City. The court certified the case as a class action, and the defendants attempted to assert counterclaims against individual members of the class. The court struck the counterclaims and held that

an individual member of a class is not a "party" against whom a counterclaim can be asserted. *Donson Stores*, 58 F.R.D. at 489. The court held that claims against individual class members could be asserted at the *damages phase* of the case on a class member-by-class member basis. *Id.* at 489-90. *See also Aamco Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440, 450 (E.D.Pa.1975) (finding that compulsory liquidated counterclaims could be effectively presented when individual claims for damages are presented); *Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 60 F.R.D. 5, 8 (N.D.Ill.1973) ("We believe the better view is that class members who file claims become 'parties' (for the purpose of Rule 13(a)) and that compulsory counterclaims must then be filed against them or be barred."); *Serpa v. Jolly King Rests., Inc.*, 1974 WL 941 (S.D.Cal.1974) ("The Court concludes that *Donson* sets forth the better view of law and procedures, especially in view of Federal Rule 13's requirement that counterclaims be brought against opposing parties and the very serious question whether unnamed members before liability is established are indeed opposing 'parties.'"); *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 349 (E.D.Pa. 1976)("[C]ounterclaims may be brought against unnamed class members only if and when these class members intervene or file claims in this action.").

Plaintiffs suggest that a set-off procedure, coupled with a determination of individual compensatory damages and prejudgment interest, is a "judicial train wreck" which will result in undue delay and prejudice to class dealers. However, Exxon is not permitted a "free ride" on the so-called "judicial train wreck." The prejudgment interest clock still will be ticking, and Exxon will be required to place into escrow the compensatory damages and prejudgment interest calculated as to the disputed class member through the date of Final Judgment, in a manner described below. Perhaps this fact alone will make set-off claims impracticable. Adjustments will be required only if a set-off is required by law.

The review and determination of set offs will occur by a Special Master in accordance with Fed.R.Civ.P. 53. The Court reserves to issue a further order establishing all necessary procedures.

2. Exxon's Right to Participate in the Claims Administration Process and to File Objections.

Plaintiffs argue that Exxon has no right to participate in the claims administration process and to file objections. The Court agrees with Exxon that Plaintiffs' contention defies basic due process. Exxon is a real party in interest. It would have to pay any damages determined to be due. It thereby has the right to appear and participate, including to object and oppose any unfounded or incorrect claim.

The Court therefore concludes that Exxon may participate during the claims administration process, and otherwise file objections. Such objections or requests may pertain to: (i) filing set-offs, as addressed above; (ii) challenging whether the class member was a dealer during the Class Period; (iii) challenging the time period the class member was a dealer during the Class Period; (iv) contesting the amount of gallons purchased by the class member during the Class Period on a yearly basis; (v) arguing the proper application of any applicable statute of limitations and release as a result of the Court's rulings; (vi) requiring a determination of "Good Faith" amount of claims for subject matter jurisdiction purposes under 28 U.S.C. § 1332, when necessary; and (vii) raising any purported miscalculation of compensatory damages and prejudgment interest for that class dealer. Where there is a dispute between, or among, class dealers as to their participation in the compensatory and prejudgment interest award, Exxon shall have no standing except to contest the total amount of the award at issue.

E. Claims Procedures.

The parties are directed to meet and confer within 45 days from the date of this Order concerning the Claims Administration Process set forth below and, within 15 days thereafter, file with the Court any objections or recommendations each may have regarding the process. By separate order, the Court shall finalize the process after hearing from the parties. *While the claims administration process may proceed through notice and receipt of claims, no further action through the appointment of the Claims Administrator, or the determination of individual claims, shall proceed until the Eleventh Circuit determines if it will accept an appeal prior to final judgment pursuant to 28 U.S.C. § 1292(b).*[32] At a minimum, the claims administration process shall include the following elements:

1. A special master, who shall serve as the Claims Administrator (hereinafter the "Claims Administrator"), shall be appointed by the Court in accordance with Fed.R.Civ.P. 53. Within the time specified above, the parties shall confer about the appropriate qualifications of the Claims Administrator and his or her powers pursuant to Fed.R.Civ.P. 53(c), and offer their joint recommendations concerning such appointment, powers, or other related subjects related to the claims

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[32] As an alternative means of bringing the issues associated with this case to the attention of the Eleventh Circuit as soon as possible, the Court is prepared to enter a Final Judgment for the named Plaintiffs under Fed.R.Civ.P. 54(b). Such a final judgment will not prejudice the claims of the remaining class members and will also allow an immediate full appeal on the merits while the claims administration process for the balance of the class is being established and implemented, and the appellate process is initiated pursuant to 28 U.S.C. § 1292(b). *Accordingly, the parties are directed to file and serve, within 30 days from the date of this Order, the necessary information upon which to enter Final Judgment for the named plaintiffs consistent with this Order. In the event that an evidentiary hearing is required so as to enable a final judgment to be entered, the parties shall notify the Court as soon as possible.*

administration process. The costs of the claims administration process shall be paid by Exxon. These costs include the cost of the class notice, the cost of distribution to the class, and the fees payable to the Claims Administrator, except that any fees to be paid to the Claims Administrator related to addressing and later resolving conflicting claims shall be paid from the compensatory damages and prejudgment interest awarded to the successful claimant. Such claimant may then recover such fees and costs from the unsuccessful claimants.

2. The Claims Administrator shall review each claim filed to determine if the information provided is sufficient and to request additional information as necessary; shall establish, as necessary, the "Good Faith" amount of claims for purposes of the Court's jurisdiction under 28 U.S.C. § 1332; shall determine if there are any conflicts among the various claims and shall identify the claimants involved and the nature of the conflict; shall compute compensatory damages and prejudgement interest in a manner consistent with the orders of this Court; shall initiate, as necessary, a state interpleader action between or among any contesting claimants; and shall open an interest bearing escrow account at a reputable financial institution acceptable to the parties.

3. The Claims Administrator's determination of the total compensatory damages and prejudgment interest, less set-offs, shall be in the form of a report consistent with Fed.R.Civ.P. 53(e).[33] Once Exxon has received the report from the Claims Administrator, it immediately shall transfer to the Claims Administrator escrow account [or individual claimant escrow accounts] a sum certain in United States dollars representing the total compensatory damages and prejudgment interest due to each claimant which shall be held

[33] The Claims Administrator may file multiple reports pertaining to sub-classes of putative plaintiffs, such as where Exxon does not contest the Dealers' claims.

in escrow pending further direction from the Court. Any accumulated interest shall be applied to the additional prejudgment interest owed to the claimant through the date of Final Judgment. Pursuant to further court order, Exxon shall further transfer to the escrow account any sum representing court costs as directed by the Court, and such compensation as fixed by the Court for the Special Master pursuant to Fed.R.Civ.P. 53(a).

4. The Claims Administrator's final report shall identify each verified claimant on a state-by-state basis, together with the total compensatory damages and prejudgment interest owed to the claimant, less any pro rata share of costs and attorney's fees as directed by court order. In addition, the Claims Administrator shall calculate additional prejudgment interest through the date of Final Judgment [which shall be provided to him or her by the Court], less any accumulated interest in the escrow account attributable to the claimant. The Court Administrator shall notify Exxon of the additional prejudgment interest due by written statement setting forth the calculations involved and providing any necessary documentation to support the calculation. Prior to the date of the Final Judgment, Exxon shall transfer to the escrow account the additional sum, as directed by the Claims Administrator.

5. In the event of disputes between or among claimants, the Claims Administrator shall calculate the compensatory damages and prejudgment interest at issue and include the amount at issue and the nature of the dispute in the final report. Exxon shall transfer the disputed amount(s) to the Claims Administrator in the manner set forth above. At such point, Exxon shall have no further responsibility or liability to the competing claimants, except to pay into the escrow account any additional prejudgment interest through the date of Final Judgment. Upon receiving competing claims, the Claims Administrator shall direct the parties to private mediation. In the event mediation is unsuccessful, the Claims Administrator

shall file interpleader actions following entry of the Final Judgment.

6. The Court shall issue a Final Judgment or series of Final Judgments which sets forth the amounts due to each claimant. Where there are competing claims, the Final Judgment shall specify, upon report from the Claims Administrator, the nature of the dispute and the sum certain in dispute. The Final Judgment shall direct the Claims Administrator to file an interpleader action against the competing claimants in the appropriate state jurisdiction involved in the event mediation is unsuccessful. The Claims Administrator shall be entitled to retain counsel for such purpose. Counsel's fees shall be paid from the escrow account applicable to the claimants involved. The Claims Administrator shall make payment to the appropriate claimant once the state judgment is final.

7. Any disputes by Exxon as to the matters to which it has standing [*see* § IV(D)(2), *supra*], shall be addressed by the Claims Administrator in accordance with Fed.R.Civ.P. 53, and resolved by the Court prior to entry of Final Judgment.

F. Plaintiffs' Attorneys' Fees and Costs.

Within twenty (20) days from the date of this Order, Plaintiffs shall submit a proposal concerning how class attorneys' fees and costs shall be awarded and distributed, and, to the extent that costs incurred are not properly chargeable against Exxon, how additional costs shall be allocated between and among the named and putative plaintiffs. Exxon shall reply, if necessary, within ten (10) days. Plaintiffs shall file a surreply in five (5) days. The Court reserves to enter an order on this procedure. Such order shall be distributed to the named plaintiffs and ultimately to the putative class members who file claims.

V. *CERTIFICATION OF INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)*

It is the opinion of this Court that an immediate appeal to the Eleventh Circuit Court of Appeals of this Order and accompanying Judgment on Special Verdict by either or both parties is appropriate and should be permitted. Pursuant to 28 U.S.C. § 1292(b), the district court may certify that an order is appropriate for interlocutory appeal if the court believes that "such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). All of the criteria are present here.

The Order in this case is the culmination of almost ten years of litigation. The question of whether an aggregate compensatory and prejudgment interest award by Final Judgment may be entered at this juncture preceding the claims administration process in a class action, and thereby creating a *cy pres* fund from which Exxon would be divested of all rights, is a controlling question of law as to which there is substantial ground for difference of opinion. Closely related, the second question of whether the 1990 amendments to 28 U.S.C. § 1367 extended supplemental jurisdiction to the claims of an entire class once the claim of at least one class member satisfies the requisite amount in controversy, thereby overruling *Zahn,* has not only resulted in a Circuit split, but an equal division among participating Justices of the United States Supreme Court. It poses a question over which this Circuit has not yet opined.

An immediate appeal from this Order, together with the judgment on Special Verdict entered in accordance herewith, will materially advance the ultimate termination of the litigation by giving direction to the forthcoming claims administration process, thereby avoiding significant lost time

and unnecessary expense if the legal conclusions set forth in this Order are ultimately reversed.

Even if the parties proceed, as this Court has directed, such that a Final Judgment is entered with respect to the named plaintiffs pursuant to Fed.R.Civ.P. 54(b), this Court still believes certification of this order for interlocutory review is warranted for the reasons stated, as it affects the remaining thousands of putative class members.

Finally, while appeal of this Order is interlocutory, this Court urges the Eleventh Circuit Court of Appeal to consider all legal issues directed to the Judgment on Special Verdict, which this Court has directed the Clerk of Court to enter, as part of its pendent appellate jurisdiction. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1365 ("Although the compel order is clearly an interlocutory order over which we would not normally have jurisdiction, we may exercise pendent appellate jurisdiction 'when a non-appealable decision is inextricable intertwined with an appealable decision or when review of the former [is] necessary to ensure meaningful review of the later.'") (citation omitted). This Court and the parties will greatly benefit from the Eleventh Circuit's review and early determination of the myriad of legal issues associated with this case before untold additional attorneys' fees and costs are incurred in reaching a Final Judgment for both the named and putative class members. For instance, it would not make sense to complete a claims administration process to thousands of Class Dealers if the Eleventh Circuit should determine that those dealers are barred from collecting damages because of their releases with Exxon.

Therefore, this Court certifies that an immediate appeal is in the best interest of materially advancing the ultimate termination of this litigation. The parties are reminded that in order to invoke the discretionary review of the Eleventh Circuit they must apply for review within ten days from the date of this order. 28 U.S.C. § 1292(b).

WHEREFORE, it is ORDERED:

1. Plaintiff's Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment is granted in part and denied in part [D.E. # 1409], as provided in this order.

2. Plaintiffs' claim to entry of an aggregate judgment in favor of the class as a whole is DENIED.

3. The Clerk of Court is directed to enter judgment in the manner set forth in Attachment A to this Order.

4. Plaintiffs' pleadings are amended so that diesel fuel purchases are included in the calculation of class members' compensatory damages.

5. The Ohio statute of limitations applies and gallons purchased by Dealers residing in Ohio prior to May, 1987, are excluded from the compensatory damage calculation.

6. The Florida statute of limitations, Fla. Stat. § 95.11(2)(b), does not bar Plaintiffs' claims in that, under the "delayed discovery doctrine," the cause of action did not accrue until November of 1990.

7. Plaintiffs are entitled to prejudgment interest, for the reasons set forth in this Order. Prejudgment interest rates and accrual dates shall be determined as set forth in this Order.

8. With regard to Claims Administration, the parties and Clerk of Court shall comply with the Court's findings, conclusions and orders on "opt outs," claims handling processes, and class notice, as set forth in this Order.

9. Exxon is entitled to participate in the Claims Administration Process, and file set-offs and objections, as warranted, as set forth in this Order.

10. The parties shall file objections to the Claims Administration Process set forth in this Order as directed. The Court reserves to finalize the process after hearing from the parties and the Clerk of Court.

11. The Court reserves to issue a Final Judgment or series of Final Judgments, as set forth in this Order, as well as to order attorneys' fees and costs.

12. Certification of interlocutory appeal to the Eleventh Circuit Court of Appeals is hereby provided pursuant to 28 U.S.C. § 1292(b), for the reasons stated in this Order. In any event, the parties are directed to proceed forward with respect to a Final Judgment for the named plaintiffs pursuant to Fed.R.Civ.P. 54(b), as directed by this order.

EXHIBIT "A"

JUDGMENT ON SPECIAL VERDICT

This action came on for trial before the Court and a jury, Honorable Alan S. Gold, United States District Judge, presiding, and the issues in the Special Verdict having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged, pursuant to Fed.R.Civ.P. 58, that judgment is hereby entered in favor of Plaintiffs, and against the Defendant, upon the Special Verdict [D.E. # 1395] rendered by the Jury on February 20, 2001. The Special Verdict made certain factual findings and established a damage factor in favor of the Class Plaintiffs in this case. Those findings and the damage factor shall govern and apply in all further proceedings involving the Class Plaintiffs and Exxon Corporation in the Claims Administration Process.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed May 31, 2001]

CASE NO.: 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC. *et. at.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

SUA SPONTE ORDER ON SUBJECT MATTER JURISDICTION

It is fundamental that a federal court must continue to inquire *sua sponte* into its subject matter jurisdiction. *Morrison v. Allstate*, 228 F.3d. 1255, 1261 (11th Cir. 2000) (citing *Fitzgerald v. Seaboard Sys. R.R., Inc.*, 776 F.2d 1249, 1251 (11th Cir. 1985) ("A federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises.").

In this putative diversity class action, the Court's subject matter jurisdiction exists pursuant to 28 U.S.C. § 1332, the diversity statute. In that regard, Exxon, in its Response in Opposition to Plaintiffs' Motion for Entry of Order on Procedure for Determination and Entry of Final Judgment, has brought to the Court's attention the recent decision of the Eighth Circuit in *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000). Exxon argues that the majority of Courts of Appeals now have concluded that 28 U.S.C. § 1367 did not

overrule the United States Supreme Court in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973).

The issue of whether the 1990 amendments extend supplemental jurisdiction to the claims of an entire class once the claim of at least one class member satisfies the requisite amount in controversy has not yet been addressed in the Eleventh Circuit, *see Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1272 (11th Cir. 2000), although this Court, in *Leszczinski v. Allinace Ins. Co.*, 176 F.R.D. 659 (S.D. Fla. 1997), citing *In Re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) and *Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1966), has ruled, in another context, that the 1990 amendment did overrule *Zahn*.

Exxon claims, however, that the recent trend in appellate decisions, as well as the Eleventh Circuit's decision in *Morrison*, makes it likely that this Court lacks subject matter jurisdiction over the claims of any class member whose claims do not satisfy the minimum jurisdictional amount requirement of 28 U.S.C. § 1332. Exxon further argues that, even if an aggregate damage award were permissible, the Court could not include in such an award damages attributable to claims over which it has no jurisdiction.

WHEREFORE, because of the importance of this issue, it is ORDERED that the parties shall present further argument on subject matter jurisdiction issues at oral argument set on June 7th, 2001 at 9:00 A.M. At such time, Plaintiffs also should be prepared to address if their claim for subject matter jurisdiction relies in whole or in part on a unified, indivisible interest in a common fund, thereby permitting them to add together, or "aggregate," their individual stakes to reach the amount in controversy threshold, *see Morrison*, 228 F.3d at 1262 through 1264, or otherwise relies on any other jurisdictional basis consistent with applicable case law.

ORDERED this 31th Day of May, 2001.

/s/ [illegible]
ALAN S. GOLD
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Filed Feb 20, 2001]

CASE NO. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

UNITED STATES MAGISTRATE
JUDGE ANDREA M. SIMONTON

SPECIAL VERDICT FORM

1. Did the Dealers prove, by a preponderance of the evidence that the facts and circumstances that existed during the Discount for Cash Program were not the "normal case"?

Yes ✓ No__

IF YOU ANSWERED QUESTION 1 "NO," YOU SHOULD SKIP TO QUESTION 3. IF YOU ANSWERED QUESTION 1 "YES," PLEASE PROCEED TO QUESTION 2.

2.a. By the preponderance of the evidence, what do you find was the nature and extent of Exxon's good faith

obligation to its Dealers during the Class Period? Was Exxon:

(i) Required to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit card recovery fee during the Class Period?

Yes ✓ No__

OR

(ii) Required to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(iii) Required to reduce the wholesale price of motor fuel by an amount that, on average, over time, across all markets, across all grades, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(iv) Required to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, over time, across all markets, across all grades, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(v) Do you find by the preponderance of the evidence that Exxon's duty of good faith

was other than as stated or in some combination of the above?

Yes __ No✓

OR

If so, please set forth below your understanding of the nature and extent of Exxon's good faith obligation to its Dealers during the Class Period, based upon the preponderance of the evidence.

State: _____

_____

_____

_____

_____

_____

_____

2.b With respect to any good faith obligation you found in answer to Question 2.a., did the Plaintiffs prove by a preponderance of the evidence that Exxon failed to set its wholesale prices of motor fuel to its dealers in good faith during the Class Period?

Yes ✓ No__

PLEASE PROCEED TO QUESTION 3.

3. By the preponderance of the evidence, what do you find was the nature and extent of Exxon's contractual obligation, if any, to its dealers during the Class Period? Was Exxon:

(i) Required to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit cost recovery fee during the Class Period?

Yes ✓ No__

OR

(ii) Required to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(iii) Required to reduce the wholesale price of motor fuel by an amount that, on average, over time, across all markets, across all grades, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(iv) Required to reduce the wholesale price of motor fuel to each dealer by an amount that, on average, over time, across all markets, across all grades, offset the 3% credit card recovery fee during the Class Period?

Yes __ No✓

OR

(v) Do you find by a preponderance of the evidence that Exxon was contractually obligated in some other manner or in some combination of the above?

Yes __ No✓

if so, please set forth below your understanding of the nature and extent of that contractual obligation.

State: _____

_____

_____

_____

_____

IF YOUR ANSWER TO ALL PARTS OF QUESTION 3 IS "NO" AND YOU ALSO ANSWERED QUESTIONS 1 OR 2.b "NO," YOUR VERDICT IS COMPLETE AND YOU SHOULD THUS SIGN AND DATE THE VERDICT FORM AND RETURN TO THE COURTROOM.

IF YOU ANSWERED QUESTION 1 AND 2.b "YES," AND ANSWERED ALL PARTS OF QUESTION 3 NO, PLEASE PROCEED TO QUESTION 5.

IF YOU ANSWERED ANY PART OF QUESTION 3 YES, PLEASE PROCEED TO QUESTION 4.

4. Did the Dealers prove by a preponderance of the evidence that Exxon failed to reduce the wholesale price in the manner you previously have found for any period between March 1983 to August 1994?

Yes ✓ No__

IF YOUR ANSWER TO QUESTION 4 IS "YES" OR YOUR ANSWERS TO QUESTIONS I AND 2.b. ARE YES, PLEASE PROCEED TO QUESTION 5.

IF YOUR ANSWER TO QUESTION 4 IS "NO" AND YOUR ANSWER TO QUESTION 1 OR 2.b. IS NO, PLEASE SIGN AND DATE THE SPECIAL VERDICT FORM AND RETURN TO THE COURTROOM.

5. If you answered "Yes" to Question 2.b and/or Question Number 4, then in the chart below indicate by placing a check in the appropriate blank provided in the left column, for each of the time periods shown,

whether you find that the Dealers proved by a preponderance of the evidence that Exxon failed to appropriately reduce the wholesale price of motor fuel. For each time period in which you find that Exxon failed to reduce the wholesale price in whole or part, in the right column state the amount in cents per gallon, by which Exxon failed to provide the reduction.

On the other hand, for each year you find that Plaintiffs failed to prove that Exxon did not appropriately reduce the wholesale price to offset the credit cost recovery fee, you should enter a zero.

Did Exxon fail to reduce the wholesale price to offset the 3% fee?

If "YES," amount by which Exxon failed to reduce the wholesale price

DATE	YES	NO	Amount (¢ per gallon)
1983 (March-December	✓		1.40
1984	✓		1.40
1985	✓		1.34
1986	✓		1.03
1987	✓		1.04
1988	✓		1.07
1989	✓		1.18
1990	✓		1.33
1991	✓		1.24
1992	✓		1.32
1993	✓		1.35
1994 (January-August)	✓		1.33

IF YOU ENTERED A ZERO IN EACH OF THE YEARS, YOUR VERDICT IS COMPLETE AND YOU NEED NOT ANSWER THE REMAINING QUESTIONS. PLEASE SIGN AND DATE THE SPECIAL VERDICT FORM AND RETURN TO THE COURTROOM.

BUT IF YOU ANSWER ANY PORTION OF THIS QUESTION WITH AN AMOUNT OTHER THAN ZERO, PLEASE PROCEED TO QUESTION 6.

6.a. Did the Dealers prove by clear and convincing evidence that Exxon fraudulently concealed facts from them concerning a breach of its Sales Agreements with the intent of leading the Dealers into not filing suit against Exxon?

Yes ✓ No__

IF YOU ANSWERED "YES" TO THIS QUESTION, SKIP TO QUESTION 7.a. IF YOU ANSWERED "NO" TO THIS QUESTION, PLEASE ANSWER QUESTION 6.b.

6.b. Did the Dealers prove by a preponderance of the evidence that Exxon fraudulently concealed facts from them concerning a breach of its Sales Agreements with the intent of leading the Dealers into not filing suit against Exxon?

Yes __ No__ [LLEGIBLE]

7.a. Did the Dealers prove by clear and convincing evidence that they exercised due diligence, but nonetheless were unable to know of facts indicating a possible claim against Exxon prior to November 1990?

Yes ✓ No__

IF YOU ANSWERED "YES" TO THIS QUESTION, SKIP TO QUESTION 8.a. IF YOU ANSWERED "NO" TO THIS QUESTION, PLEASE ANSWER QUESTION 7.b.

7.b. Did the Dealers prove by a preponderance of the evidence that they exercised due diligence, but nonetheless did not know of facts indicating a possible claim against Exxon prior to November 1990?

Yes __ No__ [ILLEGIBLE]

8.a. Did the Dealers prove by clear and convincing evidence that they relied upon alleged false statements by Exxon, and that such reliance was the direct cause of their failure to file this lawsuit sooner than May 1991?

Yes ✓ No__

IF YOU ANSWERED "YES" TO THIS QUESTION, SKIP TO QUESTION 9. IF YOU ANSWEWRED [sic] "NO" TO THIS QUESTION, PLEASE ANSWER QUESTION 8.b.

8.b. Did the Dealers prove by a preponderance of the evidence that they relied upon alleged false statements by Exxon, and that such reliance was the direct cause of their failure to file this lawsuit sooner than May 1991?

Yes __ No__ [ILLEGIBLE]

9. When did the Dealers learn, or when did their representatives have, sufficient facts to raise a suspicion and a duty to investigate, that they had a claim against Exxon?

State date Nov-1990

SO SAY WE ALL.

/s/ Allen Briggs
FOREPERSON

DATE: 2-20-2001

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Sep. 18, 2000]

CASE NO.: 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

ORDER ON MOTION TO DISCHARGE CLASS AND ON DEALER RENT

THIS MATTER is before the Court on Defendant, Exxon Corporation's Motion to Decertify the Class [D.E. # 1293] and its Motion In Limine To Exclude Evidence Regarding Dealer Rent [D.E. # 1253]. A hearing was held on both motions on Friday, September 15, 2000. At that same time, the Court heard further argument in response to its *sua sponte* order concerning subject matter jurisdiction. Based on the memoranda of law filed by the parties, and the arguments presented, it is hereby ORDERED as follows:

1. Exxon Corporation's motion to decertify the class for Count 1 of the Amended Complaint is DENIED. The class was certified pursuant to Judge Kehoe's prior order [D.E. # 912]. Thereafter, Exxon Corporation sought mandamus in the Eleventh Circuit Court of Appeals to decertify the class. Mandamus was rejected. The Court then held an extensive *Daubert* hearing which was followed by a jury trial where Plaintiffs submitted further evidence supporting proof of common issues of fact and law pertaining to class-wide duty,

breach and damages. A number of the common legal issues have already been addressed by orders of the court. Exxon now claims that the recent Eleventh Circuit decision in *Rutstein v. Avis Rent-A-Car System, Inc.*, 211 F.3d 1228 (11th Cir. 2000) requires a different decision. Upon further review, the Court disagrees that *Rutstein* requires decertification. To the contrary, based on the unique facts and law of this case relating to duty, breach and damages, the Court continues to conclude that class action is appropriate, that questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2. Exxon's Motion in Limine to exclude from the trial evidence regarding the rent paid by Exxon dealers is DENIED. The Court continued to find such evidence relevant to the issues raised by the pleading. Under a Rule 403 analysis, the probative value of the evidence is not outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

3. The Court's *Sua Sponte* Order relating to subject matter jurisdiction is discharged, and the earlier order on the matter [D.E. # 1122] is reconfirmed.

ORDERED this 18th day of September, 2000.

/s/ [illegible]
ALAN S. GOLD
United States District Court

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Jan. 11, 2000]

CASE NO.: 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

SUA SPONTE ORDER REGARDING SUBJECT MATTER JURISDICTION

By order dated July 1, 1999, the court granted Plaintiffs' motion for partial summary judgment regarding subject matter jurisdiction [D.E. # 1133]. In that order, I indicated that the Eleventh Circuit had not yet ruled on the issue of whether section 1367 had overruled *Zahn v. International Paper Co.*, 94 S.Ct. 505 (1973). While not directly answering this issue, the Eleventh Circuit in *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792 (11th Cir. 1999), did consider whether, in a class action, a potential attorneys' fee awarded out of a common fund may count in the aggregate toward the jurisdictional minimum necessary to establish diversity jurisdiction. In its analysis, the appellate court commented that: "Because the district court found fraudulent joinder, and the plaintiffs dismissed the only nondiverse party, the only issue here is whether the amount in controversy is more than $75,000. And that issue is further

narrowed because plaintiff seeks no more than $75,000, *and the compensatory damage claims of individual class members may not be aggregated to satisfy that amount. See Zahn International Paper Co.*, 414 U.S. 291, 301, 94 S.Ct. 505, 512, 39 L.Ed.2d 511 (1973)(emphasis added).

In light of the *Davis* case, the court requests additional argument from the parties as to whether, by relying on *Zahn*, the Eleventh Circuit implicitly has ruled on its continued validity in a manner which binds the district court in this case. For scheduling purposes, Plaintiffs shall submit their brief within 30 days, followed by 30 days for the Defendant's response, and an additional 15 days for any reply.

ORDERED this 7 day of January, 2000.

/s/ Alan S. Gold
ALAN S. GOLD
United States District Court

APPENDIX I

UNITED STATES DISTRICT COURT,
S.D. FLORIDA, MIAMI DIVISION.

No. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

Aug. 10, 1999

FINAL ORDER REGARDING EXXON'S AFFIRMATIVE DEFENSES AND PLAINTIFFS' ENTITLEMENT TO PREJUDGMENT INTEREST

GOLD, *District Judge*.

THIS CAUSE is before the Court *sua sponte*.[1] In response to Plaintiffs' cause of action for breach of contract, Exxon

[1] The Court has continued to exercise its pretrial duty to delineate and narrow the issues for trial and to eliminate improper issues. *See Johnson Enterprises, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1332-22 (11th Cir.1998). By prior orders, the late Judge Kehoe had denied Exxon's motions for summary judgment based on the grounds of: (1) statute of limitations [D.E. # 907]; and (2) release [D.E. # 911]. Since the issuance of the orders on summary judgment, the parties have focused on various other aspects of the case. However, in its pretrial orders, the Court has required the parties to further brief the defense issues. This Order endeavors to rule on the defense related issues and establish a procedure for post verdict procedures.

raised two affirmative defenses,[2] which, it contends, precludes a finding of liability as to, at least some of, Plaintiffs' claims: (1) the statutes of limitations in the various jurisdictions bar Plaintiffs' action as untimely;[3] and (2) releases affecting in excess of 5,000 dealer-members preclude the instant claim for breach of contract. Exxon additionally argues that Plaintiffs' attempt at avoiding these affirmative defenses by alleging fraudulent concealment cannot be adjudicated on a class-wide basis, but must be resolved in thousands of separate post verdict jury trials.[4] According to Exxon, a number of jurisdictions require Plaintiffs to prove the element of reliance in order to prevail on the fraudulent concealment claim, and, to the extent Plaintiffs are allowed to assert an avoidance, individualized issues of proof preclude resolution on a class-wide basis. Exxon also contends that some of the jurisdictions require Plaintiffs' fraudulent concealment claim to be proven by clear and convincing evidence, while others require only the standard civil burden of proof by a preponderance of the evidence. Exxon urges the Court to resolve its affirmative defenses on an individual basis, because class treatment in light of the

[2] By order issued April 21, 1998, Judge Kehoe denied Exxon's motion for partial summary judgment on the grounds of superseding contract [D.E. # 910]. Exxon has not included this ground in its statement of defenses for jury trial purposes. *See* Exxon's Response to Order on Status Conference [D.E. # 984] and its Supplemental Submission Regarding Affirmative Defenses [D.E. # 1149].

[3] Plaintiffs did not file this case until May 13, 1991. Exxon contends that dealer claims in thirty of the thirty-five states are time-barred for purchases before May 13, 1987.

[4] Exxon contends that: "With respect to those plaintiff's claims that are subject to an affirmative defense, separate proceedings for each plaintiff will be required to either allow the particular dealer to seek to 'avoid' the statutes of limitations or determine the intent of the parties to a release." Supplemental Submission of Defendant Exxon Corporation Regarding Affirmative Defense [D.E. # 1149], at 14.

jurisdictional variances would deprive Exxon of its right to meaningfully defend its position.

In contrast, although conceding that some jurisdictional differences exist, Plaintiffs contend that class-wide treatment of the common issues is appropriate. Plaintiffs aver that the common issues involved in their breach of contract claims out-number the differences; therefore, Plaintiffs should not be burdened at this stage of the proceedings with having to bring separate claims by the individual dealers. Plaintiffs have suggested alternatives to Exxon's decertification of the various issues, many utilized by courts which have previously addressed this situation.

The Court has reviewed the respective positions and arguments of the parties. Having considered the parties' concerns in light of the procedural history of this case and having conducted its own search of the law applicable in the relevant jurisdictions, the Court concludes that Plaintiffs' cause of action for breach of contract shall proceed on a class-wide basis in accordance with the following analysis and contingencies.

DISCUSSION AND ANALYSIS

As a threshold matter, the Court recognizes the policies and principles which underlie the Uniform Commercial Code (the "UCC"). Drafted under the joint sponsorship of the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws, the purpose of the UCC, including Article 2 thereof, is to "simplify, clarify and modernize the law governing commercial transactions" and "to *make uniform the law among the various jurisdictions.*" UCC § 1-102(2) (emphasis added). Except for Louisiana, all states have codified the pertinent sections of the UCC regarding the sale of goods. *See Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1142 (5th Cir.1986). Although some variance exists, it appears that the

differences are minor and do not contravene the purpose, as stated by the drafters of the UCC.

Statute of Limitations in Contracts for Sale

Article 2 of the UCC also provides procedural uniformity for bringing actions predicated on contractual relationships. *See* UCC § 2-725.[5] The ALI's version, as well as those of most of the states, include an "official comment," announcing their purpose in adopting "a uniform statute of limitations for sales contracts":

> eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation

[5] The ALI version of UCC § 2-725 [statute of limitations in contracts for sale] provides:

> 1. An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> 2. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> 3. Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
>
> 4. This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Article becomes effective.

depending upon the state in which the transaction occurred.

UCC § 2-725, cmt. Although most states have adhered to the four-year limitations period for actions on a contract for goods, a few states have opted for longer periods, while one state codified a shorter time in which to file contract claims.[6] Florida repealed its correlative UCC statute of limitations, requiring compliance with its general statute of limitations, under which actions on a contract are barred after the expiration of five years from the date the cause of action accrued. *See* Fla.Stat.Ann. § 95.11(2)(b).

Nearly all of the states have adopted language mirroring that of UCC § 2-725(4) drafted by the ALI. While discounting an aggrieved party's lack of knowledge of its cause of action as a basis for tolling or extending the statutory period, sometimes referred to as the "discovery rule," the subsection provides that it was not intended to "alter the law on tolling of the statute of limitations." UCC § 2-725(4).[7]

[6] Of the jurisdictions relevant to this action, Mississippi and South Carolina opted for a six-year statute of limitations on breach of contract and warranty claims. *See* Miss.Code Ann. § 75-2-725; S.C.Code Ann. § 36-2-725. In Colorado, claims on contracts for the sale of goods are barred after three years. *See* Colo.Rev.Stat.Ann. §§ 4-2-725, 13-80-101.

[7] Under the UCC, the discovery rule can toll the statute of limitations on actions for breach of warranties under certain circumstances. *See* UCC § 2-725(2).

The Ohio Exception

Ohio is an exception to this general rule.[8] Ohio's "savings clause" identifies the activity necessary to toll the statute, specifying that: "This section does not alter sections 2305.15 and 2305.16 of the Revised Code on tolling of the statute of limitations." Ohio Rev.Code Ann. § 1302.98(D). Having qualified its limitations period for actions arising from contracts on goods, the statute may be tolled only if: (1) the defendant "is out of the state, has absconded, or conceals *himself*"; or (2) the action against whom the cause of action is directed is disabled, due to either minority status or mental incompetence. *Id.* §§ 2305.15, 2305.16 (emphasis added). Since neither of these contingencies are present in the instant action, the four-year statute of limitations bars recovery of damages for the claims of Ohio Plaintiffs which accrued prior to May 13, 1987. This does not, however, preclude these Plaintiffs from recovering damages for Exxon's alleged breaches which occurred subsequent to that date.

The Florida Exception

Analysis under Florida law is similarly unique, and adversely impacts on the recovery of damages for claims of Florida Plaintiffs that accrued prior to May 13, 1986. According to recent case law construing Florida's statute of limitations, Florida recognizes neither the discovery rule nor fraudulent concealment as vehicles for tolling the five-year

[8] Plaintiffs have argued to the contrary, citing *Standard Alliance Indus. Inc. v. Black Clawson Co.*, 587 F.2d 813, 820-23 (6th Cir.1978). However, in that case, the court was deciding an action brought for breach of an express warranty and noted that the discovery rule within Ohio Rev.Code § 1302.98(2) applied to toll the statute of limitations. The relevant section of the Ohio Revised Code, § 1302.98, became effective as of July 1, 1962. Therefore, at all relevant times— throughout the Discount for Cash period—the doctrine of fraudulent concealment could not toll the running of the statute of limitations for a breach of contract action predicated on the sale of goods.

limitations period for actions predicated on obligations imposed under a written instrument or contract. *See Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913, 914 (11th Cir.1999) (quoting *Federal Ins. Co. v. Southwest Fla. Retirement Ctr., Inc.*, 707 So.2d 1119, 1122 (Fla.1998)); *Fulton County Admin. v. Sullivan*, 22 Fla.L. Weekly S578, 1997 WL 589312 (Fla. Sept. 25, 1997) (absent an expression of the Legislature that fraudulent concealment may act to toll the statute of limitations, courts are constrained to honor the statutory bar except for those circumstances enumerated in § 95.051).[9]

Contingencies for Tolling the Statutes of Limitations

As previously articulated, except for Florida and Ohio,[10] the uniform statute of limitations does not preempt the states'

[9] Plaintiffs direct the Court's attention to the fact that *Sullivan*, an unpublished opinion of the Florida Supreme Court, is currently pending rehearing. *See Putnam Berkley Group, Inc. v. Dinin*, 734 So.2d 532, 533 n. 8 (Fla. 4th DCA 1999). Therefore, Plaintiffs argue, that avoidance based on fraudulent concealment is unclear in Florida. However, *Sullivan* has since been cited with approval by the Florida Supreme Court. *See Federal Ins. Co. v. Southwest Fla. Retirement Center, Inc.*, 707 So.2d 1119, 1122 (Fla.1998). In turn, that case has been cited and relied upon by the Eleventh Circuit Court of Appeals. *See Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913 (11th Cir.1999). Accordingly, *Sullivan* is binding on this Court at this time.

[10] Exxon maintains that New York is also an exception to the general rule that fraudulent concealment, if proven, tolls the statute of limitations for contract actions. However, research conducted by the Court reveals that New York does permit avoidance of a statute of limitations affirmative defense. *See, e.g., Cerulean Land Developers Corp. v. Colon Development Corp.*, 144 A.D.2d 615, 535 N.Y.S.2d 35, 37-38 (N.Y.App.Div.1988); *see also Buttry v. General Signal Corp.*, 68 F.3d 1488, 1493 (2d Cir.1995); *Salinger v. Projectavision, Inc.*, 972 F.Supp. 222, 232 (S.D.N.Y.1997); *Netzer v. Continuity Graphic Assoc., Inc.*, 963 F.Supp. 1308, 1316 (S.D.N.Y.1997); *Union Carbide Corp. v. Montell N.V.*, 944 F.Supp. 1119, 1139 (S.D.N.Y.1996); *Johnson v. Nyack Hosp.*, 891 F.Supp. 155, 165 (S.D.N.Y.1995).

laws on tolling the limitations period. *See* UCC § 2-725(4). To preclude the harsh effects of their statute of limitations, several states recognize acts perpetrated by a defendant for which the defendant is estopped from using the statute of limitations as a bar to a suit for liability. *See, e.g., First Baptist Church of Citronelle v. Citronelle-Mobile Gathering, Inc.*, 409 So.2d 727, 730 (Ala.1981) ("Tolling the statute of limitations in favor of the plaintiffs is not inconsistent with the function of the statute . . . [which is to] prevent revival of fraudulent or stale claims and prevent surprise after evidence is lost or obscured.") (citing U.S. Supreme Court precedent). Thus, the propriety of tolling the statute of limitations is based on equitable principles which underlie the laws of the respective states. *See Jafay v. Board of County Comm'rs of Boulder County*, 848 P.2d 892, 903 (Colo.1993) (when a rigid application of the statute of limitations leads to an unjust result, courts may properly fashion an equitable exception to the limitations period); *see also Dean Witter Reynolds, Inc. v. Hartman* 911 P.2d 1094, 1096 (Colo.1996) ("equity may require a tolling of the statutory period where flexibility is required to accomplish the goals of justice"); *Brooks v. Southern Pacific Co.*, 105 Ariz. 442, 466 P.2d 736, 738 (1970) ("The policy underlying the statute of limitations is primarily for the protection of the defendant, and the courts, from litigation of stale claims *where plaintiffs have slept on their rights* and evidence may have been lost or witnesses' memories faded. This policy is sound and necessary for the orderly administration of justice.") (emphasis added). These equitable principles remove the statutory bar for conduct that includes, but is not limited to, fraudulent concealment of the wrongful conduct and the concept of continuing breach. *See, e.g., Duell v. United Bank of Pueblo, N.A.*, 892 P.2d 336, 341 (Colo.Ct.App.1994) (where a defendant's wrongful actions have been the cause of a plaintiff's failure to institute a timely

action, the defendant may be estopped from relying upon the resulting delay as a defense to the plaintiff's claim).

To avoid the statutory bar, Plaintiffs have alleged that Exxon fraudulently concealed the Plaintiffs' cause of action. Based on its review, the Court concludes that thirty-three of the thirty-five jurisdictions involved recognize the doctrine of fraudulent concealment as an avoidance to the statute of limitations.[11] Of these jurisdictions, twenty-nine states require Plaintiffs to prove the elements of fraudulent concealment by a preponderance of the evidence, whereas six states require Plaintiffs to establish fraudulent concealment by clear and convincing evidence. The elements of fraudulent concealment vary to some degree among the jurisdictions. From Exxon's prospective, *each plaintiff* has the burden of proving each one of the elements.[12] For reasons discussed more fully below, the Court respectfully disagrees, and concludes that the factual disputes arising from the fraudulent concealment doctrine can be properly resolved on a class-wide basis by the jury in deciding the remaining class-wide issues, notwithstanding slight variations in state law as to how certain of the elements are described.

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[11] As will be discussed, the Court has found that, of the thirty-six jurisdictions involved, since there is no issue as to the statute of limitations with regard to Louisiana Plaintiffs, only thirty-five jurisdictions were relevant to the analysis. Additionally, of these thirty-five jurisdictions, Florida and Ohio are exceptions to the general rule. *See* discussions *supra*, at p. 672, and *infra*, nn. 15 & 16.

[12] Exxon contends that each Plaintiff has the burden of proving that: (1) Exxon committed affirmative acts intended to conceal its alleged failure to file suit until May 13, 1991; (2) the individual dealer reasonably relied on those acts in deciding not to file suit until May 13, 1991; (3) the individual dealer exercised due diligence in investigating or trying to uncover the possible existence of a claim; and (4) the individual dealer did not know or suspect the concealed facts underlying his cause of action. *See* Supplemental Submission of Defendant Exxon Corporation Regarding Affirmative Defenses, at 4.

A claim or defense can implicate common issues and be litigated collectively, despite the existence of state law variations, so long as the elements of the claim or defense are substantially similar and any differences fall into a limited number of predictable patterns which can be readily handled by special interrogatories or special verdict forms. *See, e.g., In re Prudential Ins. Co. of America Sales Practices Litig.* 962 F.Supp. 450, 525 (D.N.J.1997) ("a manageable number of jury instructions could be fashioned to comport with the elements of the common law claims in the many jurisdictions.").

While Exxon contends that Plaintiffs' fraudulent concealment avoidance in this case presents individual issues because of variations of state law in the thirty-three relevant jurisdiction, a number of federal courts considering such matters have determined that the fraudulent concealment doctrine presents common issues capable of being litigated collectively in the class context. *See Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir.1975) ("The overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the common 'question' requirement. Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit."). The commonality requirement is satisfied when the alleged misrepresentations constitute a "common course of conduct," even if the statements made to each Plaintiff were not identical.[13] *See Kirkpatrick v. J.C. Bradford & Co.*,

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[13] To allege a "common course of conduct," Plaintiffs must allege in detail the specific misrepresentation and "identify or isolate any particular misstatement or omission contained in a document and contained in a

827 F.2d 718, 724-25 (11th Cir.1987); *Bresson v. Thomson McKinnon Sec. Inc.*, 118 F.R.D. 339, 343 (S.D.N.Y.1988); *In re Victor Tech. Sec. Litig.*, 102 F.R.D. 53, 56 (N.D.Cal.1984). "[A]lthough the communications to [the Plaintiff-Class] may not have been uniform, they allegedly were uniformly misleading. [Any] variations are therefore immaterial" and cannot defeat class treatment. *Bresson*, 118 F.R.D. at 343.

While oral misrepresentations have been held to be insufficiently similar to warrant class certification, written misrepresentations disseminated to all class members have often been found sufficiently similar. *Compare Kaser v. Swann*, 141 F.R.D. 337, 339 (M.D.Fla.1991) *with Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 679 (N.D.Ill.1989). Many cases predicated on securities violations have been certified as class actions with regard to pendent state law fraud claims. *See, e.g., In re Southeast Hotel Properties Ltd. Partnership Investor Litig.*, 151 F.R.D. 597 (W.D.N.C.1993); *In re Seagate Tech. Sec. Litig.*, 115 F.R.D. 264 (N.D.Cal.1987); *In re ORFA Sec. Litig.*, 654 F.Supp. 1449 (D.N.J.1987); *In re Energy Sys. Equip. Leasing Sec. Litig.*, 642 F.Supp. 718 (E.D.N.Y.1986).

Courts have also found that where there is a "common legal grievance," shared by the members of the class, "the benefit from the determination in a class action of the existence of a . . . common pattern of fraud outweighs the problems of individual actions involving such other issues as causation, reliance, and damages." *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 461 A.2d 736, 745-47 (1983). Where plaintiffs in a class action allege similar representations, the reliance issues may be presumed similar as well. *See Town of New Castle v. Yonkers Contracting Co.*,

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subsequent document which most of the other class members received." *See Blumenthal v. Great American Mortgage Investors*, 74 F.R.D. 508, 513 (N.D.Ga.1976) (citation omitted).

Inc., 131 F.R.D. 38, 43 (S.D.N.Y.1990) (common questions pervade fraudulent concealment inquiry); *Fisher Bros. v. Mueller Brass Co.*, 102 F.R.D. 570, 579 (E.D.Pa.1984) (same); *In re Screws Antitrust Litig.*, 91 F.R.D. 52, 55 (D.Mass.1981) (same): *In re Independent Gasoline Antitrust Litig.*, 79 F.R.D. 552, 559 (D.Md.1978) (same); *Reserve Life Ins. Co. v. Kirkland*, 917 S.W.2d 836, 843 (Tex.Ct.App.-Houst.1996). Consequently, courts have permitted actions for fraudulent concealment to proceed as a nationwide class if:

> convinced that individual actions by claimants would impose a strangling harness on the judiciary, as well as the parties. . . . [and] [s]eparate actions would produce considerable duplication of effort, increase the cost of litigation, create the risk of inconsistent results for parties who are similarly situated, and consume judicial resources to wasteful levels (through duplication) throughout the country.

In re Catfish Antitrust Litig., 826 F.Supp. 1019, 1045 (N.D.Miss.1993).

Here, the common questions arising from an assertion of the fraudulent concealment doctrine are: (1) Whether Exxon affirmatively concealed its breach from the dealer network; and (2) Whether the Dealer-Class, by exercising due diligence, could have determined that a breach occurred.[14] Both the evidence of Exxon's acts of concealment

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[14] According to Plaintiffs, Exxon accomplished this concealment by repeatedly assuring Plaintiffs that Exxon was adhering to its promise of offsetting its wholesale price for fuel to Plaintiffs by an amount that was equal, "on average," to the 3% credit card processing charge first assessed in August 1981. Because the cost of fuel is volatile and any proof that the offset was not implemented was contained in proprietary documents maintained exclusively by Exxon, Plaintiffs were forced to rely on Exxon's assurances of contractual performance. Plaintiffs, although suspicious that Exxon was performing as promised, did not realize a breach had occurred until 1991, when an Exxon official purportedly represented that Exxon had failed to continue, but would resume, applying

and the circumstances that would have triggered Plaintiffs' duty of due diligence would be common to the class. *See id.* at 1044.

Nevertheless, Exxon argues that the diversity among the jurisdictions regarding the elements necessary for establishing fraudulent concealment and the discrepancies in the burdens of proof require individual judicial attention. Thus, proof of the viability of Plaintiffs' avoidance is not conducive to class-wide management.

The Court is unpersuaded by Exxon's position that class-wide treatment of the relevant issues, which predominate, is inappropriate. In light of the overwhelming commonality and typicality of the issues and equitable concerns, the Court cannot "permit [Exxon] to contest the liability with each claimant in a single separate suit, [which] would, in many cases give [Exxon] an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what . . . the class suit practice was to prevent." *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir.1941); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 1174, 63 L.Ed.2d 427 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").[15]

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the offset. Immediately upon this revelation, Plaintiffs filed their breach of contract suit.

[15] Exxon also argues that a single jury cannot address the claims of Florida and Ohio Plaintiffs, where fraudulent concealment cannot avoid a statute of limitations affirmative defense, in tandem with claims of Plaintiffs permitted to assert fraudulent concealment. However, the Court disagrees with Exxon's assessment and is not persuaded by the authorities cited by Exxon in support. *Bruton v. United States*, 391 U.S. 123, 125, 88 S.Ct. 1620, 1622, 20 L.Ed.2d 476 (1968), was a criminal case wherein the Supreme Court was dealing with prejudicial testimony of a co-

Fraudulent Concealment Avoids Statutory Time Bar

Although some jurisdictional differences exist as to elements necessary to establish a claim of fraudulent concealment that avoids an affirmative pleading of a statute of limitations, the differences are not insurmountable so as to require decertification of the issue. In fact, jurisdictions which recognize fraudulent concealment fall into only two categories: those that require proof of reliance and those that do not.

Of the relevant jurisdictions surveyed, the Court found that eleven of the thirty-three jurisdictions that permit tolling of the statute of limitations for fraudulent concealment contain a reliance element [16]: California, Colorado, Maine, Maryland,

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conspirator. In *Wilson v. Gillis Advertising Co.*, 145 F.R.D. 578, 582 (N.D.Ala.1993), the evidence precluded related to the net worth of the defendant, which the court found would improperly impact on the issue of the amount and propriety of awarding punitive damages. Here, there is no prejudice, because the Florida and Ohio Plaintiffs cannot avoid the statutory time-bar on grounds of fraudulent concealment. These Plaintiffs would "fall out" of the issue *if* the jury decides fraudulent concealment was practiced by Exxon. In other words, Florida and Ohio Plaintiffs cannot recover beyond the statutory period and will not benefit by a class-wide determination of fraudulent concealment. Conversely, Plaintiffs in the remaining jurisdictions will not be advantaged, because Plaintiffs from Florida and Ohio will be precluded from offering evidence substantiating fraudulent concealment.

[16] Although Florida requires reliance be proven to prevail on a fraudulent concealment claim, such a claim cannot toll the statute of limitations. *See Sullivan*, 1997 WL 589312, at *2-3. Likewise, reliance is required for fraudulent concealment in Ohio, but its statute of limitations for contracts for goods does not provide tolling for fraudulent concealment. *See* Ohio Rev.Code Ann. § 1302.98. Moreover, while reliance is a prerequisite for proving fraudulent concealment under Louisiana law, Louisiana's statute of limitations for contract actions is ten years, negating the need to either plead or prove fraudulent concealment as to those Plaintiffs, since this action was filed within the ten-year time-frame. *See* La.Civ.Code Ann. art. 3499.

Montana, New Mexico, New York, South Carolina, Texas, Virginia, and Washington. *See Community Cause v. Boatwright*, 124 Cal.App.3d 888, 177 Cal.Rptr. 657, 664 (Cal.Ct.App.1981); *Kopeikin v. Merchants Mortgage & Trust Corp.*, 679 P.2d 599, 602 (Colo.1984); *Harkness v. Fitzgerald*, 701 A.2d 370, 372 (Me.1997); *Edwards v. Demedis*, 118 Md.App. 541, 703 A.2d 240, 251 (1997); *Poulsen v. Treasure State Indus., Inc.*, 192 Mont. 69, 626 P.2d 822, 827 (1981); *Continental Potash, Inc. v. Freeport-McMoran, Inc.*, 115 N.M. 690, 858 P.2d 66, 74 (1993); *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 153 (2d Cir.1995); *Strong v. University of So. Carolina Sch. of Medicine*, 316 S.C. 189, 447 S.E.2d 850, 852 (1994); *Arabian Shield Dev. Co. v. Hunt*, 808 S.W.2d 577, 584 (Tex.Ct.App.-Dallas1991); *Metrocall of Delaware, Inc. v. Continental Cellular Corp.*, 246 Va. 365, 437 S.E.2d 189, 193-94 (1993); *Crisman v. Crisman*, 85 Wash.App. 15, 931 P.2d 163, 166 (1997). The remaining jurisdictions require only proof of an affirmative act of concealment, while some jurisdictions also require a showing that the plaintiff was reasonably diligent in detecting the wrongful activity which gives rise to the cause of action. *See, e.g., Colonia Ins. Co. v. City National Bank*, 13 F.Supp.2d 891, 900 (W.D.Ark.1998); *Resource Ventures, Inc. v. Resources Management Int'l, Inc.*, 42 F.Supp.2d 423, 436 (D.Del.1999); *Richards v. Mileski*, 662 F.2d 65, 70-71 (D.C.Cir.1981); *Jim Walter Corp. v. Ward*, 245 Ga. 355, 265 S.E.2d 7, 9 (1980); *Ludwig v. Ford Motor Co.*, 510 N.E.2d 691, 697 (Ind.Ct.App.1987); *Cunningham v. Massachusetts Mut. Life Ins. Co.*, 972 F.Supp. 1053, 1054 (N.D.Miss.1997); *Foodtown v. Sigma Marketing Sys., Inc.*, 518 F.Supp. 485, 488 (D.N.J.1980); *Beauty Time, Inc. v. VU Skin Sys., Inc.*, 118 F.3d 140, 144 (3d Cir.1997); *Dean Witter Reynolds, Inc. v. McCoy*, 853 F.Supp. 1023, 1036 (E.D.Tenn.1994). Due diligence is a question of fact within the province of the jury's responsibilities. *See, e.g., Texas v. Allan Const. Co.,*

Inc., 851 F.2d 1526, 1533 (5th Cir.1988); *Bradley v. Maryland Cas. Co.*, 563 F.Supp. 602, 607-08 (D.Del.1983).

As to those jurisdictions that require reliance, the essential issue is whether, under the circumstances of this class action, reliance on Exxon's purported deceit can be established on a class-wide basis. Considering the circumstances, the Court concludes that it can.

Several courts have found that the requirement that reliance must be justified in order to support recovery may be shown on a class basis. For instance, federal class action cases in which stockholders have alleged fraud on the basis of printed misrepresentations in a corporation's prospectus hold that individual proof may not be required to establish reliance by each stockholder. *See, e.g., Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir.1968).[17]

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[17] Other cases in which class treatment of reliance has been held viable include the following: In consolidated actions against an automobile manufacturer that allegedly fraudulently induced purchasers to buy vehicles with a known design defect, the court properly certified the statewide class of approximately 7,500 purchasers where the purchasers' causes of action embraced common legal and factual elements and where benefit from determining the existence of a common defect and common pattern of fraud outweighed problems of individual actions involving other issues such as causation, reliance, and damages. *See In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 461 A.2d 736 (1983); in an action based upon an alleged breach of a retail installment sales contract for the purchase of a vacuum cleaner, the defendant was entitled to convert her counterclaim alleging fraud into a class action on behalf of all similarly situated purchasers of vacuum cleaners from the plaintiff, provided all prerequisites for class action status were met. Establishment of a common course of conduct by salesmen pursuant to training or "canned" techniques taught by the plaintiff would be a "common strand of misrepresentation" running through all the sales, sufficient to warrant granting class action status. *See Compact Electra Corp. v. Paul*, 93 Misc.2d 807, 403 N.Y.S.2d 611 (N.Y.Sup.App.1977); where a small number of purchasers had attempted to bring a class action claiming that the defendant vendor had falsely represented to them and others that if

The essential class-wide reliance issue for the jury is whether the Plaintiff-Class, through representatives, relied upon false representations by Exxon in delaying the filing of an action within the limitations periods. Evidence of such reliance may be proven by direct or circumstantial evidence. *See, e.g., Blackie*, 524 F.2d at 902 (Ninth Circuit citing several jurisdictions in the Second, Ninth, and Tenth Circuits); *see also Poulsen v. Treasure State Indus., Inc.*, 192 Mont. 69, 626 P.2d 822, 827 (1981) ("An inference of reliance upon fraudulent representations may be drawn from circumstances surrounding the transaction which have been proven."); *Abramovitz v. Ahern*, 96 F.R.D. 208, 218 (D.Conn.1982).[18] Moreover, "where there is [proof of] active

they made purchases of frozen food at half price for two years, they would each be given a freezer without cost, the court in held that, since the class was described as including persons who were tricked, deceived, and misled into believing that they would get a freezer without charge if they would buy frozen food at one-half the price, it would be difficult to imagine one member of the class electing to pay out his contract to the last penny. Even if one such person were found, stated the court, he would not be a part of the class represented by those whose names appeared in the caption of the complaint. *See Robnet v. Miller*, 105 Ohio App. 536, 152 N.E.2d 763 (1957); a class action was properly brought by car purchasers against a manufacturer for fraud and misrepresentation in advertising and selling Oldsmobile automobiles with engines manufactured by Chevrolet. Each class member did not have to prove exposure to advertising as the advertising was conducted through the mass media; nor did each class member have to prove reliance on the advertising if the class representative presented sufficient evidence to raise a presumption affecting the burden of going forward with evidence that all class members relied on the advertising. *See Amato v. General Motors Corp.*, 11 Ohio App.3d 124, 463 N.E.2d 625 (1982).

[18] Although Exxon "must be given fair opportunity to contest the validity of individual claims and to present defenses unique to particular claims.... At the same time, consistent with judicial economy and access to judicial relief objections to class actions, 'class members should be able to secure the relief to which they are entitled without expending more money and effort than is necessary.' " *Newberg on Class Actions* § 9.63, at 9-172 (3d ed.1992) (quoting source omitted).

concealment, Plaintiffs' due diligence is irrelevant." *Township of Susquehanna v. H & M, Inc.*, 98 F.R.D. 658, 668 (M.D.Pa.1983) (citing *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 472 F.Supp. 402, 406-07 (D.Colo.1979)).[19]

Exxon proffers no evidence or argument which purports to demonstrate that access to information and data substantiating a cause of action for breach of Exxon's promise to offset the credit card processing fee were available to some, but not all, of the dealers. To the contrary, the evidence proffered has been that Exxon continuously assured Plaintiffs that the offset was being applied "on average" to all of Exxon's dealers. Exxon admitted as much in deposition testimony of its executive officers: The question of whether the offset was being applied was raised by the dealer representatives every time Exxon addressed its dealers at national conferences, and every time the dealer representatives were told that the offset was in force. *See* Deposition of Voller, at 304-05. Whether these dealer representatives reported this information to those they represented and whether this information was disseminated raises questions of fact to be proved or disproved, and subsequently, decided by the jury.

As the case law instructs, Plaintiffs will bear the burden of proving fraudulent concealment, either by clear and convincing evidence or by a preponderance thereof. Depending on whether an individual jurisdiction requires that reliance be proven to support the claim, the reliance element may not be altogether eliminated. *See Waters v. International*

[19] The Court notes that some courts have reached contrary determinations. *See, e.g., Wolfson v. Artisans Savings Bank*, 83 F.R.D. 547, 551-52 (D.Del.1979) (limiting certified class to exclude members seeking to avoid a statute of limitations bar by asserting fraudulent concealment); *Bill Minnielli Cement Contracting, Inc. v. Richter Concrete Corp.*, 62 F.R.D. 381, 390 (S.D.Ohio1973) ("the questions of exercise of due diligence and success of concealment would have to be answered on an individual basis for each class member.").

Precious Metals Corp., 172 F.R.D. 479, 485-86 (S.D.Fla.1996) (in cases where "a course of business or a device, scheme or artifice operates as a fraud, as long as the plaintiffs are able to prove the materiality of the omitted facts, proof of reliance is not prerequisite to recovery.").[20]

Correlatively, Exxon is entitled to rebut the reliance element. Although Exxon does not have "an unequivocal right to rebut the presumption of reliance on an individual basis," and its substantive trial rights will not suffer prejudice by placing limitations upon the amount of proof it may present, *id.* at 486, Exxon shall be given the opportunity to establish that any "misrepresentations in fact" did not induce a delay in filing a cause of action until after the statutes of limitations had run, or that dealers would not have filed a cause of action even if possessed with the knowledge that Exxon did not perform its promised contractual obligation. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 248, 108 S.Ct. 978, 992, 99 L.Ed.2d 194 (1988). With this assumably disputed evidence, the parties may argue to the jury whether Plaintiffs met their respective burdens and whether the claim was successfully rebutted by Exxon.

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[20] As Plaintiffs assert, the Court may instruct a single jury as to the different burdens of proof applicable to fraudulent concealment. Such a practice will not be confusing or difficult. *See* Discussion at pp. 678-79, *infra*; *see also Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 609 (1st Cir.1985) ("The district court carefully and correctly explained the burden of proof applicable to the statutes and written interrogatories were submitted to the jury for findings on each of the three statutes. We think that the instructions, to which there were no objections, were sufficient to enable the jury to cope with the different burdens of proof and apply them correctly."); *Bonilla v. Liquilux Gas Corp.*, 812 F.Supp. 286, 293 (D.P.R.1993) ("we find that the issue of different burdens of proof can be dealt with in the judge's instructions to the jury and need not lead to confusion.").

Statutes of Limitations Are Not a Complete Bar to Recovery

Even if the jury finds that fraudulent concealment was not proven, either by clear and convincing or a preponderance of evidence, Plaintiffs are not totally barred from recovering under their contract claims. Rather, the statute of limitations will only affect the extent to which respective Plaintiffs may recover. In other words, should the jury find that fraudulent concealment did not apply, then, depending on jurisdictional constraints, some class Plaintiffs' claims will be time-barred after either 1988, 1987, 1986, or 1985. However, Exxon has not, and indeed cannot, argue that any Plaintiffs are completely barred by any relevant statute of limitation.

Differing Burdens of Proof Do Not Preclude Class-Wide Adjudication

The parties disagree as to which burden of proof for claims of fraudulent concealment is applicable in the relevant jurisdictions. They agree that state law requires proof by clear and convincing evidence in at least four states: Connecticut, Maryland, Pennsylvania, and Virginia. However, Exxon contends that twelve other states adhere to this heightened burden of proving fraudulent conduct.

The Court has reviewed the cases cited by Exxon in the twelve disputed jurisdictions. In two of these jurisdictions, the Court agrees the exacting standard of clear, unequivocal, and convincing evidence is necessary to prevail on a claim of fraudulent concealment: Vermont and Washington. *See Hughes v. Holt*, 140 Vt. 38, 435 A.2d 687, 689 (1981); *Crisman v. Crisman*, 85 Wash.App. 15, 931 P.2d 163, 166 (1997). However, case law in the remaining jurisdictions illustrate no definitive inclination to subject Plaintiffs' avoidance of Exxon's statute of limitations affirmative defense based on claims of fraudulent *concealment* to a heightened standard of proof. In the absence of clear and convincing guidance from the respective state's courts, this

Court will not imply a standard for proving fraudulent concealment other than by a preponderance of the evidence.[21] Accordingly, Plaintiffs will be required to prove fraudulent concealment by clear and convincing evidence for their breach of contract claims governed by the law of the following jurisdictions: Connecticut, Maryland, Pennsylvania, Vermont, Virginia, and Washington.

As with Exxon's argument regarding decertification due to certain jurisdictional requirements for proving the element of reliance, the dichotomy created by the differing burdens does not create an insurmountable impediment to proceeding to trial as a class. To the contrary, although "application of the laws of multiple states to a common set of claims certainly has potential complexities, [ ] on analysis, procedures and litigation devices are available, in common usage, to render these tasks manifestly manageable for the court, the jury, and all the parties." *Newberg on Class Actions* § 9.68, at 9-184. These methods include carefully crafted jury instructions and special verdict forms. *See id.*

In the instant action, the discrepancy between the two standards of proof are amenable to the issue-structuring devices afforded by jury instructions and special verdict forms. For instance, a showing of fraudulent concealment by clear and convincing evidence necessarily satisfies the lesser burden of proof by a preponderance of the evidence. Should the jury find, through directives on the verdict form, that the evidence clearly and convincingly supports Plaintiffs' avoidance claim of fraudulent concealment, then the issue is resolved. On the other hand, should the jury determine that fraudulent concealment has not been clearly and convincingly

[21] Generally, unless stated otherwise, the burden of proof in civil trials is by a preponderance of evidence. *See, e.g., Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 167 F.R.D. 90, 108 (D.Colo.1996) ("The burden of proof under which a trial is governed is 'preponderance of the evidence.' ").

proven, then Plaintiffs in the six enumerated jurisdictions will be barred from recovery on contractual damages which predated the applicable limitations periods. At that point, the jury will need to evaluate the evidence of fraudulent concealment pursuant to the preponderance of evidence standard. Should the jury find that the evidence satisfies this lesser standard, those Plaintiffs may recover from the time Exxon allegedly breached the Sales Agreements, regardless of the limitations applicable to those jurisdictions. However, if the jury finds neither burden has been met, then all Plaintiffs will be barred from recovering damages on breaches beyond their respectively applicable statute of limitations.

Application of the Continuing Breach Doctrine

In addition to recognizing various theories to avoid the preclusive effect of a statutory time limitation, some jurisdictions have adopted a continuing breach doctrine. Under this doctrine, a cause of action for breach of a contract does not begin to accrue upon the initial breach; rather, on contracts providing serial performance by the parties, accrual of a breach of contract cause of action commences upon the occurrence of the last breach or upon termination of the contract. *See, e.g., Local 194, Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc.*, 85 F.R.D. 599, 610 (N.D.Ill.1979) (complaint alleged continuing violation that reached back past the limits of the applicable statutes).

Having reviewed the contractual practices involved in this litigation in the context of case law adopting and applying the continuous breach doctrine, the Court finds that the concept cannot be used by Plaintiffs to toll the statutes of limitations. Those jurisdictions which have recognized the doctrine as an alternative equitable resolution to avoid the harsh impact of statutory limitations, applied it to successive or continuous breaches which occurred during the term of a singular contract. *See, e.g., Construction Interior Sys., Inc. v. Donohoe*

Cos., Inc., 813 F.Supp. 29 (D.D.C.1992); *Magna Assocs. v. Torgrove*, 585 F.Supp. 585 (D.Colo.1984); *Mullins v. Rockwell Int'l Corp.*, 15 Cal.4th 731, 63 Cal.Rptr.2d 636, 936 P.2d 1246, 1250 (1997); *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md.App. 605, 698 A.2d 1167, 1192 (1997); *AC, Inc. v. Baker*, 622 So.2d 331, 334 (Ala.1993) (for agreements constituting several, separate annual agreements, a breach of contract action accrues on each contract, individually, when performance under each contract is complete); *Intermedics, Inc. v. Grady*, 683 S.W.2d 842 (Tex.Ct.App.-Hous.1984); *Cannell v. Bulicek*, 8 Ohio App.3d 331, 457 N.E.2d 891, 896 (1983).

To decide the propriety of invoking the continuous breach doctrine for evaluating the time of accrual of a cause of action, the Court must first determine whether the contract is continuous or severable in nature. *See, e.g., Burger v. Level End Dairy Investors*, 125 B.R. 894, 901-02 (Bankr.D. Del.1991). Where the nature of the contract is continuous, statutes of limitations do not typically begin to run until termination of the entire contract. *See id.* However, if the nature of the contract is severable, the statutes of limitations generally commence to run on each severable portion of the contract when a party breaches that portion of the contract. *See Worrel v. Farmers Bank of Del.*, 430 A.2d 469, 474-75 (Del.Super.1981).

Here, Plaintiffs renewed their Sales Agreements with Exxon, if at all, every three years. Each Sales Agreement was, therefore, severable in nature, since performance of the parties, as to that Agreement, was presumed complete upon expiration of an express term of years. Although it may be argued that Exxon had a continuous duty to act in good faith in terminating the contract and renewing the relationships with its dealers in subsequent, successive contracts, performance under the Sales Agreements, in and of itself, was severable, giving rise to a cause of action for breach of

contract based on nonperformance. Moreover, as previously set forth in prior orders of this Court, a contractual breach of the covenant of good faith cannot be divorced from the actual breach of contract claim. *See Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 617 (3d Cir.1995) (good faith is an interpretive tool to determine the parties' justified expectations, and is not to be used for enforcement of "an independent duty divorced from the specific clauses of the contract"); *see also* UCC § 1-203, cmt. (no independent cause of action exists for failure to perform in good faith).

Plaintiffs have not persuaded the Court that each dealer's succession of Sales Agreements with Exxon constituted one, continuous contract that endured throughout the period of time the Discount for Cash program was in effect. Absent such evidence, or other unique circumstances which would distinguish the instant case from the factual scenarios of cases in which courts rejected the continuous breach doctrine for contracts severable in nature, the doctrine cannot be applied to toll the statute of limitations as codified by the relevant jurisdictions.

Exxon's Affirmative Defense on Grounds of Release

The Operative Language of the Releases

Exxon asserts as an affirmative defense that over 5,193 dealers who are members of the Plaintiff-Class executed standard Mutual Termination and Release Agreements ("Releases"). Except for a small number of Releases,[22] the

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[22] Plaintiffs concede that 385 of the 5,193 Releases do not contain qualifying language that would except the basis of Plaintiffs' breach of contract claim; that is, these Releases do not contain reference to exceptions for "trade accounts" or "reimbursements." As to these Releases, Plaintiffs urge the Court to find that these class members may bring a separate action against Exxon to void the Releases in the event Plaintiffs obtain a successful verdict against Exxon. The Court respectfully declines to address that issue. However, as noted *infra*, the Court concludes that, except in Delaware, even these Releases, *if entered*

standard form documents contain similar language. There are four standard versions of the Release provisions. The vast majority of the Releases include the following language, which defines the scope of the Release:

> Releasing each other, as of the date of this Agreement, from all claims or causes of action which each now has against each other (whether or not known to either) including but not limited to, those arising directly or indirectly under, out of or in connection with each terminated instrument, or any sales or deliveries of petroleum products, tires, batters, and/or accessories by EXXON to DEALER, *EXCEPTING, HOWEVER,* claims of each party against the other for *trade accounts,* . . . rental payments, *reimbursements*, indemnification and/or obligations arising under promissory notes, amortization agreements, mortgages, and/or security agreements, and FURTHER EXCEPTING any claims of EXXON relating to real or personal property heretofore or now in DEALER'S possession.

(Emphasis added).

The second version of the Releases includes the exception for "trade accounts" but not "reimbursements" and the third version excepts "reimbursements" but not "trade accounts." A fourth version of the Releases (approximately 385 in number) contain neither exception.[23] The first appearance of this alteration in the record is reflected in a Release executed in 1993, after this litigation was filed.

Exxon contends that all four versions of the Releases cannot be construed under principles applicable to the UCC,

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into prior to Exxon's disclosure to the dealer-class of its breach, are unenforceable if the jury finds breach of contract and fraudulent concealment *prior to the date the Releases were executed.*

[23] The Court has not undertaken a count of the Releases which fall into this category. However, the parties agree on this point: that no qualifying language is contained in 385 of the Releases in issue.

and that the Releases unambiguously bar all claims and causes of action the parties thereto had, have, or will ever have, whether known or unknown at the time the Release was executed. Plaintiffs aver that the majority of the Releases contain language which expressly excepts the present cause of action from its otherwise broad preclusive effect.[24] Additionally, Plaintiffs submit that the Releases should be construed in conformance with UCC principles, as they are an indivisible and essential part of the course of performance and dealing between Exxon and its dealers. Finally, Plaintiffs question the validity of any Releases executed after certification of the class.

The Court concludes as a matter of law that the Releases do not relieve Exxon of its individual obligation, and class-wide obligation, of good faith under its Sales Agreements with its dealers. To the contrary, Exxon's duty of good faith under the original Sales Agreements was also applicable to its conduct in obtaining Releases from the dealer-class. If the jury determines, through special interrogatories, that Exxon breached its good faith obligation to its dealers under the Sales Agreements, and that such breach was fraudulently concealed from the class, then the Releases may not, in good

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[24] Plaintiffs contend that the plain meaning of the terms "trade accounts" and "reimbursement," which appear in the vast majority of the Releases, unambiguously, and, as a matter of law, except Plaintiffs' claims from the Releases. Although the analysis set forth below does not primarily rely on these arguments, the Court concludes that Plaintiffs' arguments are well-founded as an alternative ground for finding the Releases unenforceable as applied to the specific facts of this case. The term "trade accounts" is defined by Exxon in the Releases as "including without limitation monies due and owing either party associated with motor fuel purchases or any other products purchased from Exxon by Dealer," a description that is readily applicable to this case. Similarly, Plaintiffs' claim is contemplated by the plain and ordinary definition of "reimbursement": "to pay back, to make restoration, to repay that expended; to indemnify, or make whole." *Black's Law Dictionary* (6th ed.).

faith, be uniformly enforced against an involuntary waiver of those rights. Here, Exxon does not contend that any dealer "voluntarily" and "knowingly" waived any rights with respect to the class claims at issue because, without dispute from Exxon, it met its obligations; however, if Exxon did knowingly "take back" the cost of credit adjustment, and, therefore, breached its good faith contractual obligation to its dealers, it would have contracted for the Releases in bad faith, by non-disclosure, thereby nullifying the Releases as to the instant claim. The Court further concludes that: (1) the Releases fall within the governing scope of the UCC; (2) general, all-encompassing releases must be narrowly construed, which dilutes their efficacy; and (3) Releases obtained post-certification may be invalid.

Validity of Releases Under the UCC

Contrary to Exxon's position, the Court finds that the UCC does provide the basic governing law for determining the validity of a release. Under Article 2 of the UCC, the term "waiver" means an intentional relinquishment of a known right. *See In re Humboldt Fir, Inc.*, 426 F.Supp. 292, 297 (N.D.Cal.1977). The waiver of one or more contract provisions leaves the remaining terms in force. *See id.; see also V-M Corp. v. Bernard Dist. Co.*, 447 F.2d 864, 866 (7th Cir.1971).

Releases are a form of contract, and therefore, must be interpreted pursuant to contract law. *See, e.g., Weingart v. Allen & O'Hara*, 654 F.2d 1096, 1103 (5th Cir.1981); *Gibbs v. Dodson*, 229 Ga.App. 64, 492 S.E.2d 923, 926 (1997); *Prall v. Indiana Nat'l Bank*, 627 N.E.2d 1374, 1377 (Ind.Ct.App.1994) ("A release is a species of contract. . . . The interpretation of a release, like any other contract, is determined by the terms of the particular instrument, considered in light of all facts and circumstances."); *Ristau v. Wescold, Inc.*, 318 Or. 383, 868 P.2d 1331, 1333 (1994) ("A

release agreement is a contract subject to the rules of contract construction and interpretation."). Although state contract law must be applied, "the laws concerning the construction of a general release are more or less uniform among the states." *Coral Gables Imported Motorcars, Inc. v. Fiat Motors of No. America, Inc.*, 673 F.2d 1234, 1238 (11th Cir.1982).

Since all of the Releases refer to the termination of the Sales Agreements and Automotive Credit Card Guide, the Releases and Agreements referenced therein are considered and construed in the aggregate. *See, e.g., New Life Corp. of America v. Thomas Nelson, Inc.*, 932 S.W.2d 921, 925 (Tenn.Ct.App.1996) ("A contract must be construed with reference to the situation of the parties, the business to which the contract relates, and the subject matter as it appears from the words used."); *Anheuser-Busch Cos., Inc. v. Summit Coffee Co.*, 858 S.W.2d 928, 933 (Tex.Ct.App.-Dallas 1993) ("When a release refers to a related document, the other document should be taken into consideration."). The Court, having determined that the Sales Agreements at issue come under the auspices of the UCC, finds that the Releases are amenable to UCC construction.

The UCC includes a section, entitled "Waiver or Renunciation of Claim or Right After Breach," which expressly covers the release of claims arising from UCC-governed contracts. *See* UCC § 1-107. The section provides:

> Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

UCC § 1-107. The purpose of this section is to permit parties to renounce or waive "rights or claims arising out of an alleged breach of a commercial contract." UCC § 1-107, cmt. However, in construing the enforceability of a contractual release under the UCC, the provisions of the release "must be read in conjunction with the section imposing an obligation of

good faith." *Id.* This duty of good faith must be present throughout the entire formation, as well as the performance, of the contract. *See* UCC § 2-209; *cf. IPEC Inc. v. International Lithographing Corp.*, 869 F.2d 1080, 1084 (7th Cir.1989) ("Any modification or waiver as to the first contract, though it did not necessarily need to be supported by consideration, had to meet the test for good faith imposed by the Uniform Commercial Code.").

The duty of good faith incorporated into each contract, either express or implied, assures that neither party acts in a manner that destroys the rights or interests of the other party to the agreement. *See Savoca Masonry Co., Inc. v. Homes & Son Const. Co., Inc.*, 112 Ariz. 392, 542 P.2d 817, 821 (1975). As previous orders of this Court have held, whether Exxon breached its duty of good faith is a question of fact for the jury. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn.1985). However, like contracts, if the terms of the Release are unambiguous, construction of the contract is a matter of law for the Court to decide. *See Ristau*, 868 P.2d at 1333; *Hurt v. Leatherby Ins. Co.*, 380 So.2d 432, 433 (Fla.1980) (when the language in a release is clear and unambiguous, courts cannot indulge in construction nor interpretation of its plain meaning).

Waiver of a Right Must Be Knowing and Voluntary

The interpretation of the effect of a release is based upon the intention of the parties to the instrument. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 346-48, 91 S.Ct. 795, 810-11, 28 L.Ed.2d 77 (1971). In narrowly construing a general release, it is crucial that it be interpreted so that it discharges only those rights intended by the parties to be relinquished. *See Vaughn v. Didizian*, 436 Pa.Super. 436, 648 A.2d 38, 40 (1994). Although courts favor "the finality of settlements," *see, e.g., Pettinelli v. Danzig*, 722 F.2d 706, 710 (11th Cir.1984), "[c]laims or demands . . . are

not discharged unless expressly embraced [in the release] or falling within the fair import of the terms employed." *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 188 A.2d 24, 35 (1963). A general release does not discharge liability for unknown damage already done. *See Gibbs v. Dodson*, 229 Ga.App. 64, 492 S.E.2d 923, 926 (1997). Thus, "[a]n intention to release a party from liability for unknown conduct must be clearly expressed in the release." *Id.* at 926-27 (citation omitted).

Jurisdictional Survey

The majority of the jurisdictions relevant to the instant controversy adhere to the general rule that a waiver must be made knowingly and voluntarily, and that "not every settlement that refers to post-settlement conduct necessarily results in a prospective waiver." *Adams v. Philip Morris*, 67 F.3d 580, 584 (6th Cir.1995) (construing a release under Kentucky law).[25] The laws of Delaware, have interpreted the

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[25] The Court finds that, except for Delaware, courts in the relevant jurisdictions concur. *See, e.g., People's Bank v. Pioneer Food Indus., Inc.*, 253 Ark. 277, 486 S.W.2d 24, 28 (1972) ("waiver" is a voluntary relinquishment of a known right); *Casey v. Proctor*, 59 Cal.2d 97, 28 Cal.Rptr. 307, 378 P.2d 579, 584 (1963) (general releases do not extend to claims which the releaser does not know or suspect to exist in his favor at the time of executing the release); *Scotten v. Landers*, 190 Colo. 27, 543 P.2d 64, 66 (1975) ("equity will strike down without hesitation" any release which is not fairly and knowingly made); *Muldoon*, 650 A.2d at 1245 (the Connecticut Supreme Court has held that "[t]he general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question which had not arisen at all, cannot be considered as bound and concluded by the anticipatory words of a general release."); *Columbus Hotel Corp. v. Hotel Management Co.*, 116 Fla. 464, 156 So. 893, 901-02 (1934) (release entered into between parties who had "been long engaged in attempting to adjust a highly complicated controversy" supported conclusion that parties were "fully apprised of all material matters affecting the settlement contract as executed"); *Conner v. Fisher*, 136 Ind.App. 511, 202 N.E.2d

concept of a general release as encompassing all claims between the parties, whether in the contemplation of the parties or in existence at the time the release was made. *See*

572, 575 (1964) ("waiver" is the voluntary yielding up of some existing right); *Bernstein v. Kapneck*, 46 Md.App. 231, 417 A.2d 456, 464-65 (1980) (a release does not bar existing but unknown damages "not within the contemplation of the parties at the time of contracting for such release"); *Kerr v. Small*, 112 Mont. 490, 117 P.2d 271, 273 (1941) (equates "waive" with "acquiesc[e]" in tax deed validity contest); *Gerbig v. Gerbig*, 60 Nev. 292, 108 P.2d 317, 318 (1940) (equates "waive[r]" with "voluntar[y]" acceptance); *Keelan v. Bell Comm. Research*, 289 N.J.Super. 531, 674 A.2d 603, 609 (1996) (a release executed by one "who is unaware of his rights is not a knowing or voluntary release"); *Beneficial Finance Co. of Jersey City, Inc. v. Norton*, 76 N.J.Super. 577, 185 A.2d 218, 220 (A.D.1962) ("waiver" is a voluntary, clear and decisive act, implying an election to forego some advantage which the waiving party might have insisted on); *Ed Black's Chevrolet Center, Inc. v. Melichar*, 81 N.M. 602, 471 P.2d 172, 174 (1970) ("[i]n no case will a waiver be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby");*Vaughn*, 648 A.2d at 40 ("The courts of Pennsylvania have . . . interpreted the release as covering only such matters as can fairly be said to have been within the contemplation of the parties when the release was given."); *New Life Corp. of America v. Thomas Nelson, Inc.*, 932 S.W.2d 921, 925 (Tenn.Ct.App.1996) ("a demand of which a party was ignorant when the release was given is not as a rule . . . embraced therein"); *Panorama Residential Protective Ass'n v. Panorama Corp. of Wash.*, 97 Wash.2d 23, 640 P.2d 1057, 1060 (1982) ("a waiver is an intentional and voluntary relinquishment of a known right"). The Court acknowledges that its jurisdictional analysis has rendered a result different from those of the parties. The Court concedes that the majority of the cases used in its jurisdictional survey did not involve underlying UCC contracts, but the analysis appears analogous to the Release circumstances at issue in the instant matter. Moreover, the Court found no authority to preclude the applicability of common law principles where they are not displaced by provisions of the UCC. *See Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash.App. 327, 493 P.2d 782, 787 (1972) (construing release of claims arising from underlying UCC contract). Given these decisions, it can be logically concluded that releases interpreted under the UCC would receive the same analysis and result in similar conclusions.

Hob Tea Room, Inc. v. Miller, 89 A.2d 851, 856 (Del.1952) ("a general release, one which is intended to cover everything—what the parties presently have in mind, as well as what they do not have in mind, but what may, nevertheless, arise" is a "general and final settlement" of all claims of the parties).[26] Moreover, in Virginia, while there must be an intent to include a claim of unknown damages, the releaser must show mutual lack of intent by "clear, cogent and convincing evidence." *Marshall v. Cundiff*, 211 Va. 673, 180 S.E.2d 229, 232 (1971).

Although general releases may be enforceable, it is commonly held that "based on a realistic recognition that releases contain standardized, even ritualistic, language and are given in circumstances where the parties are looking no further than the precise matter in dispute," ascertaining the underlying intent of the parties and their knowledge at the time of executing the release is crucial. *Mangini v. McClurg*, 24 N.Y.2d 556, 301 N.Y.S.2d 508, 513, 249 N.E.2d 386 (N.Y.App.Div.1969). Relevant to the inquiry "is whether there has been a conscious and deliberate intention by the parties to release" the claims which existed but were unknown to them at the time they entered into the release. *LaFleur v. C.C. Pierce Co., Inc.*, 398 Mass. 254, 496 N.E.2d 827, 832 (1986).

Of course, a compromise and settlement of a *bona fide* controversy between the parties constitutes a valid and binding agreement. *See Ruble Forest Prods., Inc. v. Lancer Mobile Homes of Oregon, Inc.*, 269 Or. 315, 524 P.2d 1204, 1206 (1974). Thus, a release which clearly and unequivocally mentions the claim to be released acts as a complete bar

[26] As to Delaware, the Court concludes that the Releases involved are not enforceable against the affected dealers that included the "exception" language referenced in footnote 24, *supra*. The Delaware Releases would be enforceable, if at all, against those dealers whose Releases contain no such qualifying language (i.e., the Category-four releases).

concerning all matters covered by the release. *See Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex.1991) (claims not clearly within the subject matter of the release are not discharged, even if they existed when the release was executed; the release must "mention" the claim to be released).

Application of Jurisdictional Law to the Releases

Viewing the Releases in the context of the applicable laws, there is no clear language that the parties intended the Releases to bar claims for Exxon's alleged breach of its promise to offset the credit card processing fee against its wholesale fuel price. As noted above, Exxon's own position, at least throughout these proceedings, belies any intent on its part to have included the instant breach of contract claim in the Release.

Exxon has repeatedly represented that it was not legally obligated to reduce its wholesale fuel price, however, it nonetheless did lower the price in an amount which "on average" offset the cost of credit card receipts submitted by its dealers. Exxon has steadfastly denied the validity of Plaintiffs' breach of contract claim. Since it was not clear to the parties that Plaintiffs even had a claim, there is no evidence to permit a reasonable inference that the parties agreed to extinguish the instant action. Moreover, the Sales Agreement explicitly states: "Termination of this contract by either party for any reason shall not relieve the parties of any obligation theretofore accrued under this contract." Sales Agreement, at ¶ 18(g). his language, together with Exxon's own exceptions for "trade accounts" and "reimbursements," would tend to infer that rights already perfected under the respective Sales Agreement could not be waived. Given these circumstances and Exxon's position, the Court concludes, as a matter of law, assuming the jury finds breach of contract and fraudulent concealment, that the affected dealers did not

[and could not] knowingly and voluntarily intend to waive damages resulting from a breach of the covenant of good faith in fixing the open price term when the Releases were executed.

Validity of Releases Executed Post-Certification

The parties dispute the validity of the Releases entered into between Exxon and members of the Plaintiff-Class after the filing of the instant action and the issuance of the order certifying this case as a class action. Plaintiffs contend that the Releases are unenforceable as a bar to this action, because Exxon did not disclose the existence of the pending litigation or dispute, and therefore, these dealers did not knowingly and voluntarily release the claims involved in this suit. Plaintiffs additionally argue that these Releases should be set aside because ethical rules governing attorneys precludes a party from settling with individual class members in the absence of participation by counsel for the class. In response, Exxon urges that the Releases are valid and act to totally bar this action.[27]

The Court finds that the post-certification Releases are governed by the same principles of law and policy that

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[27] In support, Exxon cites to a prior order entered by Judge Kehoe in July 1992, which denied Plaintiffs' motion to enjoin Exxon from entering into the Releases. However, having reviewed Judge Kehoe's order entered July 1, 1992, the Court disagrees with Exxon's interpretation. Judge Kehoe found "no evidence . . . to suggest that [Exxon was] seeking out these potential class members for the purposes" of undermining the participation of dealers in the class action by "obtaining releases." Order [D.E. # 218], at 2-3. Because Judge Kehoe found that not allowing Exxon to inform the terminating dealers of the pending litigation, which was necessary for an informed waiver, placed Exxon in an untenable position, he specifically refused to enjoin Exxon's business practices of procuring a Release "when a dealer *chooses to end his relationship*." *Id.* at 3 (emphasis added).

govern the pre-certification Releases. That is, for the Releases to be valid, they must have been knowingly and voluntarily made and procured in good faith. *See, e.g., Scotten v. Landers*, 190 Colo. 27, 543 P.2d 64, 67 (1975).

Having reviewed an exemplar of the Release executed post-certification, as supplied by the parties, the Court finds no express mention of the instant litigation. Because this action was pending at the time these Releases were negotiated and executed, even if the affected Plaintiffs had constructive notice of the claims filed by the dealer-class, the Releases do not definitively demonstrate that the claim was intended by the parties thereto to be included in the general waiver of claims. *See Victoria Bank & Trust Co.*, 811 S.W.2d at 938 (if the claims existed when the release was executed, the release must mention the claims to be discharged). Consequently, the Court concludes, as a matter of law, that the Releases executed after certification of the Plaintiff-Class cannot bar those Plaintiffs from participating in the litigation of this action.[28]

ISSUES REGARDING PREJUDGMENT INTEREST

Plaintiffs have requested that any judgment entered in their favor include all interest which accrued prior to the rendered verdict. Exxon opposes Plaintiffs' contention that the issue of prejudgment interest can be handled on a class-wide basis. Rather, according to Exxon, the various jurisdictions differ as to the decisionmaker of entitlement to prejudgment interest, the time from which prejudgment interest accrues, and the nature of the evidence relevant to deciding whether and to what extent Plaintiffs are entitled to prejudgment interest. Having reviewed the submissions of the parties and

[28] Having found that the post-certification Releases do not preclude those Plaintiffs from proceeding to a verdict, it is unnecessary for the Court to address whether the Releases obtained post-certification are voidable based on ethical rules regulating the practice of law.

conducted an independent search of the laws in the relevant jurisdictions, the Court concludes as follows:

> Prejudgment interest, pursuant to statute, is awarded as a matter of right in twenty-five jurisdictions, and accrues from the date on which the money was wrongfully withheld, in this case, from the date of the breach.[29] Those jurisdictions are: Alabama, California, Colorado, Delaware, District of Columbia,[30] Florida, Georgia, Kentucky, Louisiana,[31] Maryland,[32] Massachusetts,

[29] These jurisdictions require that the damages be liquidated in nature. "A claim is liquidated when it is subject to mathematical computation without reliance on opinion or discretion." *Aries v. Palmer Johnson, Inc.*, 153 Ariz. 250, 735 P.2d 1373, 1384 (Ct.App.1987). Based on the evidence in the record and the testimony of the parties' respective experts, the Court has determined that Plaintiffs breach of contract damages are liquidated. As trial progresses, should it become apparent that the damages are not calculable as to be "subject to mathematical computation," the Court shall amend its conclusion accordingly.

[30] Two sections of the District of Columbia's Code regulate the allowance of interest on judgments. Under D.C.Code § 15-108, prejudgment interest is mandatory "to recover a liquidated debt on which interest is payable by contract or by law or usage." Pursuant to D.C.Code § 15-109, prejudgment interest is merely discretionary when the amount is unliquidated or is not provided by contract, law, or usage. *See Giant Food, Inc., v. Jack I. Bender & Sons*, 399 A.2d 1293, 1305 (D.C.1979). Under the circumstances, the Court finds that § 15-108 applies, permitting the award of prejudgment interest as a matter of right. Although the contracts at issue are silent as to the award of any interest, case law instructs that "[w]here there has been a complete deprivation, prejudgment interest is an element of complete compensation for the loss of use of [ ] money 'from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.'" *Nolen v. District of Columbia*, 726 A.2d 182, 185 (D.C.1999) (quoting *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1253 (D.C.1990) and *West Virginia v. United States*, 479 U.S. 305, 310-11 n. 2, 107 S.Ct. 702, 706 n. 2, 93 L.Ed.2d 639 (1987)).

[31] Louisiana has different accrual periods, depending on whether the claim is for a breach of a promise under the contract ("*ex contractu*"), for which interest begins accruing from the time of the breach, or whether

Montana, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Washington,[33] West Virginia, and Wyoming.[34] While three additional jurisdictions award prejudgment interest as a matter of right, interest is calculated as accruing from the date Plaintiffs made formal judicial demand, which would be the date the

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damages are requested for a breach of a duty under a contract ("*ex delicto*"), for which interest accrues from the date of the judicial demand, or the filing of the complaint. Since the Court has repeatedly found that a breach of the duty of good faith cannot be a separate cause of action, the Court concludes that any prejudgment interest should accrue from the date of the breach.

[32] For entitlement to prejudgment interest as of right in Maryland, there must be an obligation to tender a certain sum upon a certain date. *See Crystal v. West & Callahan, Inc.*, 328 Md. 318, 614 A.2d 560, 572 (1992) ("The ordinary rule in contract cases, if the contract requires payment of a sum certain on a date certain, is [that] prejudgment interest typically is allowed as a matter of right.").

[33] In Washington, although entitlement to prejudgment interest on liquidated claims is a matter of right, a trial court, in its discretion, may reduce or disallow such interest upon a finding that the plaintiff unreasonably delayed in prosecuting a claim. *See Colonial Imports v. Carlton Northwest, Inc.*, 83 Wash.App. 229, 921 P.2d 575, 583 (1996) ("prejudgment interest on liquidated claims ordinarily is a matter of right, but . . . trial judges have discretion to disallow such interest during periods of unreasonable delay in completing litigation that is attributable to claimants.").

[34] Wyoming normally requires that a formal demand notifying the defendant that an amount is due be made before the accrual period for interest commences. *See, e.g., Northern Gas Co. v. Town of Sinclair*, 592 P.2d 1138, 1143 (Wyo.1979). However, the Wyoming Supreme Court has also recognized that when deprived of the beneficial use of money, a plaintiff should be compensated for the loss during the time of the deprivation. *See Goodwin v. Upper Crust of Wyoming, Inc.*, 624 P.2d 1192, 1198 (Wyo.1981) (the plaintiffs "were entitled to the use of the money they were to receive under the agreement from the date it became due. . . . [Therefore,] [p]rejudgment interest should have been awarded in an attempt to compensate for that loss.").

Complaint was filed on May 13, 1991. These jurisdictions are: Arizona, Maine, and New Hampshire.

In the remaining jurisdictions, entitlement to prejudgment interest is discretionary, requiring the presentation of evidence in support of such entitlement. Only one jurisdiction, Virginia, requires that the issue be decided by the fact finder. *See* Va.Code Ann. § 8.01-382 ("In any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, *may* provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence.") (emphasis added); *see also Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 449 S.E.2d 799, 801 (1994) ("This section provides for the discretionary award of prejudgment interest by the trier of fact, who 'may provide for' such interest and fix the time of its commencement. The accrual of postjudgment interest, however, is mandatory. . . ."). The Virginia Supreme Court has declared that "prejudgment interest is an element of compensatory damages." *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 257 Va. 1, 509 S.E.2d 307, 321 (1999) (citation omitted).

While Virginia's statute clearly assigns the discretionary authority to award prejudgment interest to the jury, the proof necessary for deciding whether it is appropriate and from what date prejudgment interest should accrue is less defined. However, appellate decisions instruct that the touchstone is a sum that will fully and fairly compensate Plaintiffs for the damages sustained for the delay in the payment of money due. *See, e.g., Gill v. Rollins Protective Servs. Co.* 836 F.2d 194, 198 (4th Cir.1987) (prejudgment interest is compensatory in nature "and is designed to compensate the plaintiff who has been without deserved relief for an extended period of time."); *City of Danville v. C & O Ry.*, 34 F.Supp. 620, 638 (W.D.Va.1940) (prejudgment interest is allowed when it "appears necessary to compensate the plaintiff adequately, i.e.

to make him whole"); *COOMBS v. SUMMITT*, 1996 WL 1065539, at *5 & n. 6 (Va.Cir.Ct. May 20, 1996) (providing Virginia Model Jury Instruction regarding damages and prejudgment interest in a negligence cause of action).[35]

In six jurisdictions, the Court decides whether prejudgment interest should be awarded. Those jurisdictions are: Connecticut, Indiana, Mississippi, New Jersey, New Mexico, and Tennessee. *See* Conn.Gen.Stat.Ann. § 37-3a; *Brandewiede v. Emery Worldwide*, 890 F.Supp. 79, 82 (D.Conn.1994) ("An award of prejudgment interest pursuant to Section 37-3a is an equitable determination within the discretion of the court."); Ind.Code Ann. § 34-51-4-7; Miss.Code Ann. § 75-17-7; N.J.Stat.Ann. § 12A:2-710; *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1070 (1988) (prejudgment interest may be awarded on contract claims in the discretion of the court in accordance with equitable principles); N.M.Stat.Ann. § 56-8-4; Tenn.Code Ann. § 47-14-123. However, in Mississippi, accrual is not discretionary, and commences at the time the complaint was filed. *See* Miss.Code Ann. § 75-17-7 (the judgment "shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no

[35] This Court does not have ready access to the Virginia Model Jury Instructions. Therefore, Plaintiffs' counsel shall be responsible for providing the relative instruction and to brief the Court as to the evidence they intend to proffer to assist the jury in determining: (1) the propriety of prejudgment interest for the Virginia Plaintiffs necessary to fully compensate for the loss of the use of any wrongfully withheld money by Exxon; and (2) the date from which prejudgment interest should accrue in order to effectuate complete relief. Recognizing that the proffer of this evidence as to only the Virginia Plaintiffs might infer that either: (1) only Virginia Plaintiffs would be entitled to prejudgment interest; or (2) all other Plaintiffs will receive prejudgment interest in the event of a favorable verdict, the Court shall bifurcate that part of the proceedings to ensure the interests of the Virginia Plaintiffs, as well as Exxon, are equally considered and protected.

event prior to the filing of the complaint."). Similarly, while Indiana allows for some judicial discretion, "the court shall determine the period during which prejudgment interest accrues. . . . However, the period may not exceed forty-eight (48) months." Ind.Code Ann. § 34-53-4-8. In Connecticut, New Jersey, New Mexico, and Tennessee, the Court is given full discretionary authority to determine the appropriate time from which prejudgment interest may be awarded. Nevertheless, the Court must recognize that "the equitable purpose of prejudgment interest is to compensate a party for lost earnings on a sum of money to which it was entitled, but which has been retained by another." *Sulcov v. 2100 Linwood Owners, Inc.*, 303 N.J.Super. 13, 696 A.2d 31, 39 (App.Div.1997); *see also Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn.1992). Factors which the Court may consider in reaching a determination include: whether the detention of the money was wrongful under the circumstances; whether the sum recovered was a liquidated amount; and whether Plaintiffs diligently presented their claim. *See Brandewiede*, 890 F.Supp. at 82.

The remaining issue necessary for resolution is the rate at which interest should accrue. For instance, the New Mexico statutory rate of prejudgment interest becomes fixed at the rate in effect at the time the action is filed. *See Grynberg v. Roberts*, 102 N.M. 560, 698 P.2d 430, 433 (1985). While in other jurisdictions, it will be necessary to determine the various rates to which prejudgment interest was subjected throughout the entitlement period—either from the date of breach or the date the complaint was filed. The parties will be required to supply such data to the Court. Otherwise, the entitlement and accrual periods of prejudgment interest shall be in accordance with the aforementioned conclusions.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Jul 01, 1999]

CASE NO.: 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SUBJECT MATTER JURISDICTION

Plaintiffs move pursuant to Fed.R.Civ.P. 56 for partial summary judgment with respect to the court's subject matter jurisdiction over those members of the named class and the putative class with claims that may be less then the $50,0000 amount in controversy jurisdictional threshold in effect at the time the diversity-based class action was filed. For reasons stated below, I conclude that the court has subject matter jurisdiction over Plaintiffs' claims and over the claims of all class members, including those named Plaintiffs' and putative class members whose claims may not meet the minimum amount in controversy requirement of 28 U.S.C. § 1332.

The essential facts related to the Plaintiffs' motion are not disputed. At the time the initial complaint in this case was filed May 1991, the required minimum jurisdictional amount

was $50,000. Plaintiffs' have alleged that the court has supplemental jurisdiction under 28 U.S.C. § 1367 [First Amended Complaint, ¶ 3.] Several of the named Plaintiffs' claims are over $50,000.

My predecessor, Judge Kehoe, previously denied Exxon's motion to dismiss for lack of subject matter jurisdiction on October 12, 1994. His order did not address or consider the applicability of supplemental jurisdiction. While the Magistrate Judge did discuss supplemental jurisdiction in his report and recommendation [recommending that Exxon's motion to dismiss for lack of subject matter jurisdiction be denied], his petition on supplemental jurisdiction was *dicta* and not binding on this court. In any event, I conclude it is wrong as a matter of law.

Admittedly, there is a legitimate division of opinion on this subject matter and Magistate Brown's view may be proven ultimately correct. I, however, have addressed the legal aspects of this issue at .ength in *Leszcznski v. Alliance Insurance Co.*, 176 F.R.D. 659 (S.D. Fla. 1997) and relied on decisions from the Fifth and Seventh Circuits[1] which concluded that section 1367 overruled *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973)(holding that each putative class plaintiff had to satisfy the amount in controversy, or be dismissed from the class action). Since *Leszcznski*, the Third and Tenth Circuits have concluded that *Zahn* remains valid. *See Mritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999) and *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998).

To date, The Eleventh Circuit has not ruled on the issue. It has recognized that "[S]ome dispute exists as to whether *Zahn* has been overruled by the recent passage of 28 U.S.C. section 1367(b) which would provide supplemental juris-

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[1] *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) and *Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996)

diction over class members' claims so long as one class representative meets the jurisdictional requirement. [citations omitted]. We need not address this issue because we hold that the class claim for punitive damages may be considered in the aggregate when determining the amount in controversy." *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357 n.9 (11th Cir. 1996).

Pending a contrary ruling from the United States Supreme Court or the Eleventh Circuit, I continue to adhere to *Leszcznski* and conclude that supplemental jurisdiction is applicable in diversity cases such as this case. I concur with Plaintiff that no single dealer or small group of dealers could ever have afforded to prosecute a case like this one against Exxon unless courts exercise supplemental jurisdiction. For better or worse, the class is entitled to their day in court.

WHEREFORE, it is ORDERED that Plaintiffs' Motion for partial Summary Judgment Regarding Subject Matter Jurisdiction is GRANTED.

ORDERED THIS 1 DAY OF July, 1999.

/s/ [illegible]
ALAN S. GOLD
United States District Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Filed Apr 21, 1998]

Case No. 91-0986-Civ-Kehoe
United States Magistrate
Judge Stephen T. Brown

ALLAPATTAH SERVICES, INC., *et al.*,
Plaintiffs,

v.

EXXON CORPORATION,
Defendant.

ORDER ON EXXON'S MOTION TO DECERTIFY THE CLASS FOR COUNTS I AND III OF THE FIRST AMENDED COMPLAINT

THIS CAUSE came before the Court upon Defendant Exxon's Motion to Decertify the Class for Counts I and III of the First Amended Complaint [Docket No. 746]. After reviewing the record, hearing argument of counsel, and otherwise being fully advised in the premises, it is hereby ORDERED and ADJUDGED that Exxon's Motion is DENIED.

Exxon argues that individual issues predominate over common ones, that a change in circumstances has occurred since the case was originally certified by this Court, and that this cause is unmanageable as a class action. The Court disagrees.

The common issues which govern this dispute have their origin in Exxon's alleged obligation as to all of its branded dealers over a twelve (12) year period to "unbundle" a 3% credit cost recovery fee from the wholesale price of motor fuel. Throughout this time period, Exxon claimed to its dealers, and others, that it had reduced the wholesale price of motor fuel by an amount sufficient to offset the 3% credit cost recovery fee it first began to charge in August of 1982. Exxon asserts that it has accomplished this "unbundling" of credit cost recovery fees by maintaining a wholesale pricing system which compared its wholesale prices to its competitors so that "on average, over time, across all markets," the reduction would be found in the ultimate price. By its very nature, this alleged obligation is owed to the entire class of dealers, the breach of which can be determined *only* by an "on average, over time, across all markets" analysis of Exxon's relationship with *all* of its dealers.

The existence of some individual issues does not defeat the commonality requirement of Federal Rule of Civil Procedure 23, which requires only that common issues predominate, not that they be unanimous. Thus, ". . . claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action . . ." *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983); *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D. Fla. 1992); *Kreuzfeld v. Carnehammer*, 138 F.R.D. 594, 599 (S.D. Fla. 1991); *Pottinger v. City of Miami*, 720 F.Supp. 955, 958-59 (S.D. Fla. 1989). Furthermore, courts have held that a class meets the commonality requirements of Rule 23(b) when the defendant has a standardized policy or course of conduct toward members of the proposed class. *CV Reit*, 144 F.R.D. at 696 (S.D.Fla. 1992); *Lawson v. Wainwright*, 108 F.R.D. 450, 458 (S.D. Fla. 1986).

The fact that Exxon's dealer Sales Agreements changed in some respects during the class period is not determinative. All

the agreements are governed by the provisions of Article 2 of the Uniform Commercial Code, which permits the introduction of parol evidence to explain, or construe, the terms of a writing. Because the principal contractual issues in this case include course of dealing and course of performance evidence which uniformly applies to all members of the class, and because that evidence consists entirely of what Exxon wrote, did or said in its uniform relationship with its dealer network, the fact that Exxon employed various editions of its standard form agreements is irrelevant. *See Kleiner v. First National Bank of Atlanta*, 97 F.R.D. 683 (N.D. Ga. 1983).

Exxon's assertion of various affirmative defenses does not change this conclusion. Decertification is not warranted merely because particular defenses may be available against individual class members. *E.g., Merk v. Jewel Food Stores I*, 702 F.Supp. 1391, 1395 (N.D. Ill. 1988); *Riordan v. Smith Barney*, 113 F.R.D. 60, 65 (N.D. Ill. 1986); *Dirks v. Clayton Brokerage Co. Of St. Louis Inc.*, 105 F.R.D. 125, 132 (D. Minn. 1985); *Newberg on Class Actions*, § 4.26, p. 326.

Moreover, as asserted by the Plaintiffs, instead of creating a predominance of individual issues, Exxon's affirmative defenses can be viewed as raising even more common issues of law and fact. For example, Plaintiffs' rebuttal of Exxon's statute of limitations defense is based upon Exxon's alleged fraudulent concealment of the Plaintiffs' claims on a class-wide basis, thereby making the issue appropriate for class action determination. *See, Walsh v. Ford Motor Co.*, 616 F.Supp. 1170, 1171 (D.D.C. 1985). And determination of Exxon's release defense will be based upon a uniform and class-wide interpretation of the appropriate scope of Exxon's standard form release agreement. Under these circumstances, any individualized proof that may arise in connection with the releases does not outweigh the benefits of proceeding as a class action. *See Jennings Oil Co., Inc. v. Mobil Oil Corp.*, 80 F.R.D. 450, 458 (S.D.N.Y. 1978).

Finally, Exxon has failed to demonstrate a change in circumstances since the time this action was initially certified as a class legally-sufficient to justify decertification at this time. The consideration of a motion for decertification of a class is governed by a higher standard than that applied to the original certification motion. Exxon must demonstrate the existence of newly-discovered facts or law or that the circumstances have materially changed in support of its decertification motion.[1] *Washington v. Vogell*, 158 F.R.D. 689, 692-693 (M.D. Fla. 1994); *In re Harcourt Brace Jovanovich, Inc. Sec. Lit.*, 838 F.Supp. 109, 115 (S.D.N.Y. 1993); *Robin v. Doctors Officenters Corp.*, 686 F.Supp.199 (N.D. Ill. 1988); *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D. Pa. 1975). Rearguing grounds which were or could have been argued earlier, is not sufficient. *In re Harcourt*; 2 Herbert Newburg and Alba Conte, *Newberg on Class Actions* §7.47 (3d Ed. 1992).

In this case, Exxon has not produced meaningful evidence in support of decertification. In addition, each of the five arguments now asserted by Exxon was previously made and rejected by this Court at the certification stage. The previously rejected arguments include Exxon's claim that certain contractual documents were not uniformly sent to all dealers, that the contract claims require consideration of

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[1] Exxon contends that this Court should undertake a *de novo* analysis of certification, notwithstanding years of extensive discovery, briefing and determining that this case is appropriate for class action treatment. Exxon relies on *Ezell v. Mobil Housing Board*, 709 F.2d 1376 (11th Cir. 1983). In *Ezell*, the district court entered the certification order *only one month* after the action was brought. Then, realizing the hastiness of its decision, the court held an evidentiary hearing on certification at which the plaintiffs were unable to present any evidence of class-wide discrimination. Only after this evidentiary hearing, during which the court analyzed the evidence for the first time, did it enter a decertification order decertifying the class. This Court followed an entirely different process in initially certifying this case.

extrinsic evidence, that the statute of limitations and fraudulent concealment doctrines vary among thirty-five states and require individualized proof, that there were four different price terms of different Sales Agreements (rather than just one) in effect and applicable to class members, and finally, that the issue of whether an individual dealer was "double-charged" requires dealer-by-dealer proof. Accordingly, the Court finds that decertification is not warranted.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 21st day of April, 1998.

/s/ James W. Kehoe
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT COURT JUDGE

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Jun 25, 1996]

CASE NO. 91-0986-CIV-KEHOE
UNITED STATES MAGISTRATE JUDGE
STEPHEN T. BROWN

ALLAPATTAH SERVICES, INC., *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR CERTICATION OF CLASS WITHOUT QUALIFICATION

THIS MATTER came on before the Court on Plaintiffs' Motion for Certification of Class Without Qualification, and after having reviewed the Motion, the Response thereto of Defendant, Exxon Corporation, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion for Certification of Class Without Qualification is hereby GRANTED.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida this 25th, day of June, 1996.

/s/ James W. Kehoe
UNITED STATES DISTRICT COURT JUDGE

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Oct 25. 1995]

Case No. 91-0986-CIV-KEHOE

ALLAPATTAH SERVICES, INC.,
a Florida corporation, *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
a New Jersey corporation,
Defendant.

ORDER

FOR THE REASONS stated in the Report and Recommendation of the United States Magistrate Judge, and upon independent review of the file, it is

ORDERED AND ADJUDGED that the motion to certify the "Discount for Cash" class [Docket No. 511 is GRANTED *subject* to further inquiry by the court into the ability of the class to handle the costs and expenses of this litigation.[1]

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 25th day of October, 1995.

/s/ James W. Kehoe
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT JUDGE

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[1] At, or prior to, the trial in this matter set for the week of November 6, 1995, the Court will hear argument on the issue of the " . . . ability of the class to handle the cost and expenses of this litigation."

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Oct 12, 1994]

Case No. 91-0986-CIV-KEHOE

ALLAPATTAH SERVICES, INC., a Florida corporation, *et. al.*,
Plaintiffs,

vs.

EXXON CORPORATION, a New Jersey corporation,
Defendant.

ORDER

FOR THE REASONS stated in the Report and Recommendation of the United States Magistrate Judge [Docket No. 338], and upon an *careful* and *independent* review of Defendant's objections to the report and recommendation, the Plaintiffs' response to the objections, the Defendant's reply to the Plaintiffs' response, and the file generally, it is

ORDERED AND ADJUDGED that the Defendant's motion to dismiss the amended complaint for lack of subject matter jurisdiction [Docket No. 296] is *DENIED*.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 12th day of October, 1994.

/s/ James W. Kehoe
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX O

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-KEHOE

ALLAPATAH SERVICES, INC., *et al.*,
Plaintiffs,

vs.

EXXON CORPORATION,
Defendant.

REPORT AND RECOMMENDATION
RE: CLASS CERTIFICATION

THIS MATTER is before this Court on plaintiff's Motion for Certification of Plaintiff's "Discount for Cash" Class. This Court has reviewed the motion, the response, the reply, the surreply of the defendant, the surrebuttal of the plaintiffs, and the entire file in this cause. Additionally, this Court conducted a lengthy hearing and heard argument of counsel on June 9, 1994.

THE CASE

The plaintiffs in this case are retail dealers who had Sales Agreements with the defendant. The plaintiffs allege that the defendant breached the standard form written agreements with its retailers. The plaintiffs allege, in the alternative, that either Exxon breached the Sales Agreements by unilaterally modifying the agreement and then failing to live up to the modification, or that the defendant breached the implied

terms of the agreements by charging the plaintiffs twice for the same "credit card processing charge."

The plaintiffs seek to certify the following "Discount for Cash" Class:

> All persons and/or entities owning and/or operating businesses for the retail sale of Exxon gasoline who were parties at any time from August 1982 through the present to a standard Sales Agreement with Exxon and who were damaged by Exxon's failure to remove from the wholesale price of gasoline the charge for credit card processing.

The complaint in this action contains four counts. The first is essentially the breach of the written agreement. The second claims a breach of oral contract. The third makes a claim for unjust enrichment, and the fourth deals with alleged damages suffered as a result of the Valdez oil spill. This report and recommendation only addresses Counts I and III of the complaint.[1]

ALLEGED FACTS

Prior to August 1982, it is alleged that built into the wholesale price of gasoline sold to Exxon retailers was a charge for processing credit card payments. It is further alleged that in August of 1982 Exxon undertook to change their process of billing for credit card processing. Exxon instituted, on a national basis, a 3% surcharge on all credit card processing. It further undertook to remove that credit card charge from the wholesale price of gasoline, thereby

[1] As to Count II—the count for oral contract—the plaintiffs do not appear, from their motion, to be seeking to certify class on that basis—a wise decision on their part. This Court has presently pending a report and recommendation recommending the dismissal of Count IV, and the plaintiffs have not sought to certify class with regard to that count, at the present time.

reducing the price of gasoline it sold to its retailers. This decision and its subsequent implementation was published in written documentation circulated throughout the nation as well as oral presentations. While there are questions surrounding exactly when, where, and how this change in procedure was publicized, there is evidence in the record to support that the procedure was implemented on a standardized basis throughout the country. Both prior to and subsequent to the implementation of this change in pricing, the standard Sales Agreement[2] provides that the buyer agrees to pay the seller for the seller's product "seller's established dealer price appropriate for the transaction."

Finally, it is alleged by the plaintiffs that after implementation of this new procedure, Exxon proceeded to extract the 3%, credit card charge from the dealers but did not correspondingly remove credit card charging fees from the wholesale price of gasoline, thereby having the effect of charging retailers twice for credit card processing if they utilized credit card processing in their dealership, or alternatively, failing to lower the wholesale price of fuel to dealers, per their nationwide agreement to do so, even if they did not actually process credit card charges.

Essentially, the allegations are that Exxon agreed to lower the "seller's established dealer price appropriate for the transaction . . ." in August of 1982 so as to only charge dealers for credit card processing actually used, but in reality failed to do so.

LEGAL ANALYSIS

Rule 23 of the Federal Rules of Civil Procedure governs the certification and maintenance of class actions. Under Rule

[2] Defendants point out that there are some differences in the standard Sales Agreement signed by various Exxon retailers, but for the purposes of this report and recommendation, the distinctions therein do not affect this Court's decision.

23, plaintiff must initially satisfy each of the four threshold requirements of Rule 23 (a):

(1) the class must be so numerous that joinder of all members is impracticable;

(2) questions of law or fact common to the class must exist;

(3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and

(4) the representative parties must fairly and adequately protect the interests of the class.

Plaintiffs seeking to represent the class bear the burden of establishing that all four requirements have been met. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987), *reh'g denied en banc*, 832 F.2d 1267 (11th Cir. 1987), *cert. denied*, 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2 421 (1988); *Gilchrist v. Bolger*, 733 F.2d 1551 (11th Cir. 1984); *Kreuzfeld v. Bertill Carnehammar*, 138 F.R.D. 594 (S.D. Fla. 1991).

Once the requirements of Rule 23(a) have been satisfied, plaintiffs must then demonstrate the action sought to be certified falls within one of the categories set forth in Rule 23(b).[3] *See Kirkpatrick*, *supra*.

Rule 23(b)(3) provides for class certification where:

> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the

[3] While the specific magic words are not spelled out, it is obvious from the motion of the plaintiffs that they seek to certify this class under Rule 23(b)(3).

> fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (A) the interest of members of the class and individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) the difficulties likely to be encountered in the management of a class action.

Each of the elements will be discussed in turn as it applies to this case this case.

NUMEROUSITY

Neither party has argued that the numerosity requirement is not satisfied. Indeed, there is a stipulation by the plaintiffs that the class members are so numerous the joinder of all of them is impracticable. There is no argument by the defendant to the contrary. However, "[T]he defendants' own argument that the massiveness of the class militates against certification eloquently argues that the numerosity requirement is satisfied." *See Coleman v. Cannon Oil Company*, 141 F.R.D. 516, 520 (M.D. Ala. 1992). A close question should be resolved in favor of the finding of numerosity. *See Kreuzfeld*, *supra*. Even a mere inconvenience in being able to join all of the persons makes class litigation desirable. *See In re: Alexander Grant & Co. Litigation*, 110 F.R.D. 528 (S.D. Fla. 1986).

COMMONALITY OF QUESTIONS OF LAW AND FACT

In order to certify a class, it must be established by the plaintiffs that there is a presence of common questions of law or fact. However, this does not require that all class members

have exactly the same legal claims. *See Johnson v. American Credit Co. of Georgia*, 581 F.2d 526 (5th Cir. 1978).[4] As one court has noted, the issue appears to turn on whether or not there is at least one issue that affects all or a significant number of the proposed class members. *See Kreuzfeld, supra.* Allegations of standardized conduct by defendants toward members of the proposed class will support a finding of commonality. *See In re: Amerifirst Securities Litigation*, 139 F.R.D. 423 (S.D. Fla. 1991). Allegations of such standardized conduct are clearly present in this case. As indicated earlier, there are allegations, along with at least some evidence to support same, that Exxon took action on a standard nationwide basis and then failed to follow through on the very actions it undertook.

Exxon argues that since there is no signed written modification to any of the Sales Agreements, plaintiffs' contention that the agreements were unilaterally modified in 1982 is without merit. However, there are two problems with Exxon's position:

(1) That argument goes to the merits of the case which is not an appropriate consideration on a motion for class certification. *See Kirkpatrick, supra; Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984).

(2) The allegations of this case do not require proof of a modification to the Sales Agreement in order for the plaintiffs to prevail.

The Sales Agreement provision for establishing price was the same prior to 1982 as it is subsequent thereto. Those terms have not changed. What is relevant here is that extrinsic evidence must be considered in determining the "seller's

[4] Cases decided by the Fifth Circuit prior to October 1, 1981, are binding in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

established price *appropriate for the transaction . . .*" (emphasis added).[5] Therefore, while there may not have been a modification to the contract in the strict sense as argued by the defendant, it is alleged that Exxon's actions may be construed to have changed the "seller's established price appropriate for the transaction . . ." and therefore plaintiffs may be able to support their position without an actual modification of the Sales Agreement.

Exxon makes a strong argument that the element of reliance precludes certification of the class. Exxon argues that there is evidence in the record (and there is) that some dealers were not aware of the Discount For Cash program, some may not have been aware of the reduction in the wholesale price of gasoline, some may not have been aware of either. This Court is not persuaded that this argument precludes certification of the class for two reasons:

(1) The Eleventh Circuit has clearly suggested that where there are sufficient common and factual legal issues, the presence of the factual issue of individual reliance does not render the claims unsuitable for class treatment. *See Kirkpatrick, supra* at 724-725. *See also Kennedy v. Tallant*, 710 F.2d 711 (11th Cir. 1983).

(2) Even more importantly, Exxon's reliance argument is only appropriate on the question of whether or not the Sales Agreement was modified. As noted, *supra*, this Court finds that this is not a necessary prerequisite to the plaintiffs prevailing in this action or for certifying a class. Exxon cannot argue that the dealers, uniformly, did not rely on their Sales Agreements. Certainly, where two parties enter into a written contract, reliance on the part of each should be, and is, presumed.

[5] The extrinsic evidence is the actions taken by Exxon, not the retailers, which is alleged to be uniform and nationwide in nature.

Since this Court finds that it is possible for the plaintiffs to proceed in this claim even if they are unsuccessful in arguing that Exxon unilaterally modified the contract, individual reliance, in this case, is not a roadblock to certification of the class. While there is substantial evidence documented in this record that several dealers did not know about and/or did not rely on the specifics of the Discount For Cash program or the corresponding reduction in the wholesale price of fuel, there is no evidence in this record—and this Court would be shocked to find any—that the Exxon retailers did not rely on their Sales Agreement.

There is ample support for the proposition that, where the written documents exist (as they allegedly do in this case), the contents thereof "and the implications arising therefrom . . . ." leave for the court "as a matter of law to make the necessary determinations as to the impact thereof . . ." *See Allen v. Carlotti*, 400 F.Supp. 1037, 1042 (S.D. Fla. 1975), *affirmed*, 552 F.2d 1086 (5th Cir. 1977).

While defendant cites extensively in support of its position the case of *Brooks v. Southern Bell Telephone & Telegraph Co.*, 133 F.R.D. 54 (S.D. Fla. 1990), that case is substantially distinguishable from the *allegations* in the instant case. In declining to certify a class in *Brooks*, the court found that "each prospective class member's proof of the existence and terms of his contract, and any modifications thereto, will necessarily rest on different sources." *Id.* at 56. In the instant case, there is evidence to support that there is a standard contract and, as discussed, *supra*, proving a modification of contract is not necessarily a roadblock to plaintiffs' claim herein.

Additionally, under the Uniform Commercial Code, Exxon has an obligation to price in "good faith." *See* U.C.C. § 2-305(2). The pertinent section of the Uniform Commercial Code relied upon by the plaintiffs has been enacted in forty-nine of the fifty states, the District of Columbia, Guam, and

the Virgin Islands. While Louisiana has not adopted it, its Civil Code has similar language. That section of the code provides that there can be a contract with what is known as an "open price term", which is precisely what the Sales Agreement in the instant case contains.

U.C.C. § 2-305(2) states "a price to be fixed by the seller or by the buyer means a price for him to fix in good faith." Exxon argues that if it has an obligation to fix a price in "good faith", the dealers will have to show that Exxon's wholesale price was unreasonable in light of market conditions. This is a spurious argument if, indeed, plaintiffs can prevail on showing that Exxon agreed to reduce the wholesale price of fuel to "unbundle" the credit card processing charges, and then failed to do precisely that, which resulted in double charging to those dealers actually processing credit card claims. Market conditions are irrelevant to this issue.

Finally, the mere presence of factual difference will not defeat the maintenance of a class action if there are common question's questions of law. The rule provides that there need not be common questions of both law and fact but either will suffice. *See Pottinger v. City of Miami*, 720 F.Supp. 955 (S.D. Fla. 1989).

Therefore, when considering the commonality present by virtue of the Uniform Commercial Code, the standard Sales Agreement contracts, the alleged nationwide change in Exxon's position which was implemented on a national basis, and the alleged national failure of Exxon to comply, this Court concludes that for the purposes of this motion, the commonality requirement of Rule 23(a) has been satisfied.

TYPICALITY

In evaluating whether the plaintiffs have satisfied the requirement of typicality, a determination must be made whether the class representatives have the same essential

characteristics as the claims of other members of the class. *See Appleyard v. Wallace*, 754 F.2d 955 (11th Cir. 1985); *In re: Amerifirst Securities Litigation*, *supra*. The defendants have argued that there are factual distinctions between the plaintiffs herein and other class members and that there may be unique defenses applicable. Neither of these arguments necessarily defeats class certification. *See Appleyard*, *supra*; *In re: Amerifirst Securities Litigation*, *supra*. "A strong similarity of legal theories will satisfy the typicality prerequisite despite factual differences." *Kreuzfeld*, *supra*, at 600. Defendant's argument against typicality merely states that "proof of the claims of the named plaintiffs would not establish each class member's claim because proof of each class member's claims requires individual proof on a number of critical issues." (Pg. 28 of Exxon's Opposition to Plaintiffs' Motion for Class Certification). As noted, *supra*, and will further be discussed, *infra*, the Court rejects that argument.

A class representative's claim is sufficient to satisfy the typicality requirement if it arises from the same event or course of conduct that gives rise to the claims of the other class members and is based on the same legal theories. *See Kennedy v. Tallant*, *supra*; *Lawson v. Wainwright*, 108 F.R.D. 450 (S.D. Fla. 1986). It is sufficient to satisfy the requirement of typicality if there is a nexus between the class representative's claims or defenses and the common questions of law or fact which unite the class. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984) *cert. denied*, 470 U.S. 1004, 105 S.Ct. 1355, 85 L.Ed.2d 387 (1985). As that court stated:

> "A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Typicality, however, does not require identical claims or defenses. A factual variation

> will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class.

Id. at 1337.

Finally, "As long as Plaintiffs assert, as they do here, that Defendants committed the same wrongful acts in the same manner against all members of the class, they establish the necessary typicality." *See In re: Amerifirst Securities Litigation*, *supra*, at 429. In short, the evidence in this record supports that the plaintiffs' claims are typical of the claims of the class, thus satisfying the requirements of Rule 23(a)(3).

ADEQUATE CLASS REPRESENTATION

Rule 23(a)(4) requires that the named class representatives "fairly and adequately protect the interest of the class." *See Kirkpatrick*, *supra*, at 726. In determining adequacy of representation, the Court must first determine whether plaintiffs' counsel is qualified, experienced and generally able to conduct the proposed litigation. *Id.* Based on the record in this case, this Court has no problem concluding that plaintiffs are represented by competent and zealous counsel.[6]

So long as there is no antagonism between the interest of the class representatives and class members, adequacy of representation seems to fall more, in the Eleventh Circuit, on the focus of the attorneys. *See In Re: Alexander Grant & Co.*, *supra*. This is because the economics of a class action suit often cause greater financial interest to existing counsel than an individual member. *See Kirkpatrick*, *supra* at 727. *See also, Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985); *Pottinger*, *supra*.

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[6] While this Court is aware of the untimely passing of one of the lead counsel for the plaintiffs, this Court does not find that unfortunate occurrence to change its position.

One area of this portion of the rule is of concern to the Court. One of the considerations in whether or not the representative parties will fairly and adequately protect the interest of the class is the ability and willingness to pursue the litigation with regard to possible costs of same. *See* e.g. *Brooks, supra; Powers v. Stuart-James Co., Inc.*, 707 F.Supp 499 (M.D. Fla. 1989).

Defendants have noted some question as to whether or not the plaintiffs have shown that they are able to fund the suit adequately. They have sought permission to solicit contributions from absent class members, suggesting limited means of funding the class. Plaintiffs' reply and surreply fail to challenge that allegation. The question therefore remains as to whether or not if the class is certified, the resources will be available so that this case can proceed in an orderly fashion. Accordingly, further information on this subject should be required by the Court prior to any class being certified. This Court finds, therefore, that plaintiff satisfies the necessary perquisites of the four elements of Rule 23(a) except as just noted, and would require further assurances regarding the cost factor prior to certification of a class.

RULE 23(b)(3)

In order to certify a class, the plaintiffs, in addition to satisfying the four elements of Rule 23(a), must also satisfy this Court pursuant to Rule 23(b)(3) "that the questions of law or fact common to the members or the class predominate over any questions affecting individual members, and that a class action is superior to any other available methods for the fair and efficient adjudication of the controversy." In order to meet this requirement, the class must satisfy a two-pronged test: predominance and superiority. That is, the questions of law and fact must predominate over individual questions and class must be superior to other avenues of litigation available.

This Court has already concluded that the predominance question has been satisfied in earlier discussion on commonality and typicality. This rule only requires that common questions predominate over individual ones—not that there is a complete absence of individual questions. *See Cox v. American Cast Pipe Iron Co.*, 784 F.2d 1546 (11th Cir. 1986), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986). "[I]f the liability issue is common to the class, common questions are held to predominate over individual questions." *See In Re: Amerifirst Securities Litigation*, *supra* at 434.

Defendant has strenuously argued to support its position that individual questions predominate over the common ones. In that regard, among other things, Exxon turns to its affirmative defenses.[7] Exxon first raises the issue of the statute of limitations. Potential defenses of the statute of limitations do not necessarily defeat the availability of a class action. *See Kennedy*, *supra*. As noted, earlier, the merits of the plaintiffs' claim are not an appropriate consideration in this motion. There is support in the Southern District of Florida for the proposition that the question of whether or not a claim is barred by the statute of limitations goes to the merits of the claim and is therefore not appropriate consideration on the issue of class certification. *See CV Reit, Inc. v. Levy*, 144 F.R.D. 690 (S.D. Fla. 1992).

Exxon raises the question of dealers having signed releases. While, giving defendant the benefit of the doubt, that this does raise some individualized questions, this Court finds that issue, in and of itself, insufficient to defeat certification.

Two cases are heavily relied on by the defendant on this issue. In *Abercrombie v. Lum's, Inc.*, 345 F.Supp. 387 (S.D.

[7] Exxon's affirmative defenses have not actually been pled yet since Exxon has not yet filed an answer. However, for purposes of this motion, they will be considered.

Fla. 1972) the court declined to certify a class. Factually this case involved vastly different circumstances than the instant case. On the issue of releases the court noted over 127 general releases. The court indicated that individual examination of those releases and the intent of the parties mitigated against the certification of the class. In *Plekowski v. Ralston Purina Company*, 68 F.R.D. 443 (M.D. Ga. 1975) the court noted, as a factor weighing against class certification, "several hundred class members. who have executed releases of varying types. . .". *Id.* at 451.

Both cases are easily distinguishable on two bases:

(1) The evidence in this case is that there are only a couple of variations of a basically standard release used by the defendant, and;

(2) In those cases, the release problem was only one of several weighing against class certification.

This court finds persuasive the case law dealing with satisfaction of claims and agreements to arbitrate. There is case law supporting the fact that if some of the parties have signed agreements to settle or, on another front, agreements to arbitrate, they are not bases for denying class certification. *See* e.g. *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), *affirmed* 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), *reh'q denied* at 446 U.S. 947, 100 S.Ct. 2177, 64 L.Ed.2d 804 (1980). *See also Kirkpatrick*, *supra* at 725 (the presence of an arbitration agreement in some of the contracts with prospective class members does not eliminate the possibility of proceeding with the class action). Accordingly, while the release defense may present some individualized questions, this Court does not find that this predominates so as to defeat class certification.

It is appropriate, at this time, to further address the issue of unjust enrichment. In order to prevail on a claim for unjust enrichment, as apparently agreed to by both parties, the

requirements are: (a) a benefit conferred upon the defendant by the Plaintiff; (b) appreciation by the defendant of the benefit; and (c) acceptance of the benefit by the defendant under circumstances that make it inequitable for him to retain the benefit without paying the value thereof. *See* e.g. *Craig W. Sharp, P.A. v. Adalia Bayfront Condominium, Ltd.*, 547 So.2d 674 (Fla. 2d DCA 1989). Exxon correctly states that the tests will be to include "whether Exxon has been unjustly enriched at the expense of each dealer either (i) because Exxon allegedly charged *each* dealer *twice* for credit card processing . . . or (ii) because Exxon accepted increased sales volume as a result of each dealer's participation in the DFC program." The problem with Exxon' s argument is it seeks to focus the unjust enrichment burden (from the standpoint of proof) on each individual dealer. However, as correctly argued by the plaintiffs, the focus of the unjust enrichment claim is on Exxon. The plaintiffs need not prove whatever it is that the plaintiffs have done, other than proving that they conferred a benefit upon Exxon—by being double charged or by paying in excess of the "seller's established price appropriate for the transaction." Thereafter, the focus is on Exxon and not on the dealers. This Court does not find that this issues.[8]

Finally, the voluminous litigation in this case (which is still at the Motion to Dismiss stage—there having been no answer filed by the defendants) is ample proof, standing alone, that this case is appropriate for class action treatment. "Rule 23 [and the policy behind its creation] is to be preferred to premature speculations about draconian case management." *Coleman*, *supra* at 520. While it is possible that multiple

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[8] Exxon argues, without authority, that "the elements of a claim for unjust enrichment differ from state to state . . ." (Footnote 9, page 8 of Exxon's Sur-Reply). However no showing has been made that, given the focus on Exxon and not the plaintiffs as discussed, supra., that the differing state laws make any difference.

individual actions could occur, they would be far less economical and far more burdensome than a class action.

Under Rule 23(c) the court may amend or alter the definition of the class at any time prior to rendering a decision on the merits. *See Pottinger*, *supra* at 960. The court may modify the class or create sub-class, even after certification occurs. *See Cox*, *supra* at 1553. Even in doubtful cases or when a question exists, the benefit of the doubt should sway in favor of certifying the class, if for no other reason that the fact that decertification is always possible. *See Coleman*, *supra* at 530. The interest to the class members in individually controlling the prosecution of separate actions is minimal in the present litigation. This, however, is supportive of the preference of a class action.

Even if, as alleged by the defendants, because there is a minimum requirement for an amount in controversy, these cases are subject to individualized prosecutions (or even group prosecutions), the volume of the litigation in this case, alone, stands as a strong and sturdy column to support a class action in this matter as being much the preference over numerous cases throughout the country.

RECOMMENDATION

It is therefore recommended that Plaintiffs' Motion to Certify the Discount For Cash class be GRANTED subject to further inquiry into the ability of the class to handle the costs and expenses of litigation. Indeed, plaintiffs themselves note "the costs and expenses of each class member suing one of the largest corporations in America are prohibitive . . . " (Pg. 18 of plaintiffs' revised memo in support of class certification). Therefore, this Court would require the plaintiffs to readdress the cost factor (giving the defendants an opportunity to respond) prior to class certification.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND ORDERED this 10th day of August, 1994 at Miami, Florida.

/s/ [illegible]
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX P

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986 CIV KEHOE

ALLAPATTAH SERVICES, INC., a Florida corporation, *et al.*,
Plaintiffs,

vs.

EXXON CORPORATION, a New Jersey corporation,
Defendant.

REPORT AND RECOMMENDATION

THIS MATTER is before this court on the motion of the Defendant Exxon Corporation to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction (D.E. 296). This court has considered the motion, the response, the reply, the appendices submitted by the defendant, the exhibits filed by the plaintiff, and all other matters pertinent to the resolution of this matter. Additionally this matter was briefly discussed at a hearing which took place on Thursday, June 9, 1994.

FACTS

The plaintiffs herein are seeking to establish a class action against defendant Exxon Corporation. The basis for the claims (as it pertains to this motion) is that Exxon breached a contract with the plaintiffs (or in the alternative became unjustly enriched at plaintiff's expense), and all of this came about by failure to lower the wholesale price of fuel at a point in time when plaintiff's allege Exxon was obligated to do so.

The Motion to Dismiss is based upon defendant's contention that, this matter cannot be certified as a class action, because each class member must individually have at least $50,000.00 in controversy pursuant to the diversity jurisdiction of this court under 28 U.S.C. § 1332. The defendants contend that since there are proposed members of the class that would have claims below the minimum jurisdictional amount, this court lacks subject matter jurisdiction to consider this matter. Defendant claims that "[U]nder the circumstances, the court lacks subject matter jurisdiction over the class action claims even if the jurisdictional allegation of the Amended Complaint is construed to allege that *each* class member has claims in excess of $50,000.00." (page 8 of defendant's Memorandum in Support of Motion to Dismiss).

DISCUSSION

Plaintiffs have brought suit under the diversity provisions of the U.S. Code. Accordingly, pursuant to 28 U.S.C. § 1332(a) this court only has jurisdiction where the matter in controversy exceeds the sum or value of $50,000.00. However, plaintiff alleges that because this court has jurisdiction over *some* of the cases, there is additional jurisdiction over the remaining cases pursuant to 28 U.S.C. § 1367 [supplemental jurisdiction].

The leading case on the issue of subject matter jurisdiction under facts similar to these is *Zahn v. International Paper Company*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). Defendant cites this case for the proposition that a class cannot be certified if all members do not exceed the minimum jurisdictional amounts. This court agrees with that analysis. However, defendant attempts to cite this case for the further proposition that because there may be prospective members whose claims do not exceed the minimum jurisdictional amounts the case should be dismissed for lack of subject matter jurisdiction. With that reasoning, this court disagrees.

A careful reading of *Zahn* suggests that it stands for the proposition that each plaintiff in a class action founded on diversity must exceed the minimum jurisdictional limits of 28 U.S.C. § 1332. It does not hold that a class cannot be certified (as alleged by the defendant) as a class made up of those persons whose claims do exceed the minimum jurisdictional amount. It supports defendant's position only in the factual situation where only the named plaintiffs can show damages in the jurisdictional amount.

Zahn clearly indicates that "the entire case must be dismissed where *none* of the plaintiffs claims more than $10,000.00[1]. . ." 414 U.S. at 300, 94 S.Ct at 511. However, where some of the plaintiffs do allege that the minimum jurisdictional amount is satisfied, the court also requires "that any plaintiff without the jurisdictional amount must be dismissed from the case even though others allege jurisdictionally sufficient claims." *Id.* This obviously infers that those with valid claims can proceed. There is a significant difference between dismissal of the case where none of the plaintiffs has the sufficient jurisdictional prerequisites, and dismissing the individual litigants where some of them have jurisdictionally sufficient claims. In summary the court found that "[E]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case . . ." *Id.* at 301; see also *In re: School Asbestos Litigation*, 921 F.2d 1310 (3d Cir. 1990). Therefore this court finds that there is no basis to dismiss the case on the lack of subject matter jurisdiction argument allegedly (according to defendant) supported by *Zahn*.

This court next addresses plaintiffs' argument that class members may be included even if the subject matter amount

[1] That was the minimum jurisdictional amount at the time of the 1973 decision.

of their claim is below the requirement of 28 U.S.C. § 1332 based on the Supplemental Jurisdiction law more recently enacted (more recently than *Zahn*).

28 U.S.C. § 1367 provides that in cases where federal district courts have original jurisdiction, "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . ." 28 U.S.C. § 1367(a). As opposed to creating a new basis for jurisdiction as alleged by the plaintiffs, it has been held that "with regard to pendent jurisdiction in diversity cases as opposed to 'federal question' cases, the legislature simply codified and made clear, existing case law. See *C.D.S. Diversified, Inc. v. Franchise Finance Corp. of America*, 757 F.Supp. 202 (E.D. N.Y. 1991). As that court noted, the supplementary jurisdiction law which became effective in 1990 did not change the requirements as noted in *Zahn*, *supra.*, that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in federal courts" (414 U.S. at 294, 94 S.Ct. at 508). This court cited, with approval, Moore's Federal Practice in stating "it has been observed that pendent-party jurisdiction is no longer viable under the current state of the law in a case where the amount in controversy is below the required jurisdictional amount or where diversity of citizenship is absent." *C.D.S. Diversified, Ins., supra.* at 205-206. Other courts have reached similar conclusions. In Massachusetts a district court held "that the statute [28 U.S.C. § 1367] was not intended to effect the jurisdictional requirements for diversity class actions set forth in *Zahn*". See *Mayo v. Key Financial Services, Inc.*, 812 F.Supp. 277 (D. Mass. 1993). Inferentially the same decision was reached in the case of *Meredith v. Schreiner Transport, Inc.*, 814 F.Supp. 1001 (D. Kan. 1993). That court refused to exercise pendent jurisdiction over a state claim because the amount in controversy was below the required minimum under 28 U.S.C. § 1332.

Therefore it is the opinion of this court that plaintiff may not add parties to the class (in the event a class is certified) unless those parties have claims which comply with the minimum jurisdictional amounts of 28 U.S.C. § 1332.

Finally this court finds that under the liberal rules of pleading in Federal Court, the jurisdictional allegations suffice. Paragraph one of the complaint is dissected with microtweezers by the defendant in an effort of obfuscate the obvious—it is alleged that each plaintiff satisfies the required monetary jurisdictional prerequisite. This fact remains true notwithstanding defendant's unsubstantiated smokescreen on page 6 of its memorandum.

As to the sufficiency of the evidence on subject matter jurisdiction, there is evidence in the record, sufficient at this stage of the pleadings, to show that at least some of the plaintiffs exceed the minimum jurisdictional amount. No allegation has been made that plaintiff is required, at this stage of the lawsuit, to list each plaintiff satisfying the minimum jurisdictional amount, much less prove those allegations. There is however, law suggesting to the contrary. See e.g. *In re: School Asbestos Litigation*, *supra.*; *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). Defendant constantly, no matter the particular motion, weaves its argument to the class certification issue and this argument is no exception. This motion deals with jurisdiction and not manageability, feasibility or viability of certifying a class. If two of the named plaintiffs have claims in excess of the jurisdictional amount, this court *has* subject matter jurisdiction. If a class is not certified, those named plaintiffs who qualify can still proceed with a cause of action as individual or joined plaintiffs. Defendant actually appears to concede as much. (See footnote 4, page 8 of defendant's reply brief).

RECOMMENDATION

Since we are dealing with defendant's Motion to Dismiss this case for lack of subject matter jurisdiction it is respectfully recommended that said motion be DENIED.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable James W. Kehoe, Senior United States District Judge for the Southern District of Florida. Failure to fi objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte, v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958, 109 S.Ct 397 (1988).

DONE AND ORDERED this 21st day of June, 1994 at Miami, Florida.

/s/ [illegible]
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX Q

STATUTORY PROVISION

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Pub.L. 101-650, Title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

APPENDIX R

APPELLATE PROCEDURE RULE

Fed. R. Civ. P. 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Member-ship in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily

understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be

given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request

exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

• the work counsel has done in identifying or investigating potential claims in the action,

• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

• counsel's knowledge of the applicable law, and

• the resources counsel will commit to repre-

senting the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and,

for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003.)

(2)

No. 04-70

Supreme Court, U.S.
FILED
AUG 20 2004
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IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY & ALLEN, P.A.
150 West Flagler Street
2000 Museum Tower
Miami, FL 33130
(305) 371-2223

EUGENE E. STEARNS*
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
150 West Flagler Street
Suite 2200
Miami, FL 33130
(305) 789-3200

* *Counsel of Record*

Counsel for Respondents

189173

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Respondents (herein, "Plaintiffs" or the "Class") incorporate by reference Exxon's identification of the parties to this proceeding in its petition for certiorari ("Pet."). With respect to each of the corporate Respondents (all identified corporations other than Exxon Mobil Corporation), there is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in the corporate Respondent.

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OPINIONS BELOW

The principal orders addressing the propriety of class certification are the district court's orders (i) denying Exxon's two motions to decertify (168a-169a; 215a-219a), (ii) denying Exxon's motion for summary judgment, 61 F. Supp. 2d 1308, (iii) denying Exxon's motion to exclude Plaintiffs' expert and damage evidence based on *Daubert*, 61 F. Supp. 2d 1335, and (iv) denying Exxon's Rule 50 and Rule 59 motions (R.App. 1a-10a).

The order that Exxon's petition characterizes as "determining that the cause of action could proceed on a class-wide basis" (App. 172a) does not do so. This order is limited to the district court's determination that the Class could present, together with the case in chief, a fraudulent concealment avoidance to Exxon's statute of limitations defense.

INTRODUCTION

Exxon asserts two circuit conflicts as grounds for certiorari, one challenging *class certification* (an issue affecting one hundred percent of the damage award), and another, challenging *supplemental jurisdiction* over claims less than the minimum amount of the diversity statute (an issue affecting less than ten percent of the damage award). But Exxon presents the issues in the wrong order, as this Court has consistently held the potentially dispositive issue of class certification should be considered in advance of the determination of federal subject matter jurisdiction under the diversity statute. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999); *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 612 (1997). In this reply, we address Exxon's two issues in the appropriate sequence, which makes clear that the petition should be denied on both grounds advanced.

Class Certification

There is no conflict in the circuit court decisions, important issue, or any other compelling reason that warrants review of class certification. Exxon's initial premise, that the Eleventh Circuit's decision stands as authority for the proposition that "distorting the law of the applicable states" is appropriate in class actions "where individual reliance is an issue," is frivolous as the opinion, on its face, does nothing of the kind. Mis-characterization of the ruling is a predicate to Exxon's real argument that this Court should review *the district court's* analysis of the underlying facts and state laws to determine certification improper. This Court has always rejected such an undertaking. Were it to do so, the Court would find that Exxon's presentation of both the facts and state law is unsupportable.

Supplemental Jurisdiction

The question of supplemental jurisdiction in class actions has divided the circuits, and even this Court. The interests of the parties in this case, however, are not properly aligned to bring this issue into the sharp contrast the Court expects in resolving important issues of federal jurisdiction. Exxon has previously taken a public stance on this issue opposite to the one taken here. Moreover, Exxon has no financial stake in the outcome. If dismissed, class members with claims less than the jurisdictional amount of the diversity statute will simply refile their claims in state court, on a claim as to which Exxon's liability has already been determined.

Similarly, although Class counsel chose to bring this case in federal court, they are hardly appropriate advocates for the interests of the world's multi-national corporations which maintain that federal jurisdiction over class actions should be as expansive as possible. In addition, because of the advanced

stage of these protracted proceedings, and because there is an adequate and independent basis for diversity jurisdiction over the smaller claims, this case does not provide an appropriate vehicle to address the circuit split.

STATEMENT OF THE CASE

The Facts Established at Trial

Exxon's Petition offers as fact the now discredited version of the Discount for Cash ("DFC") program promoted to dealers during the Class period, ignoring the evidence introduced at trial (virtually all of which came from Exxon's witnesses, admissions and business records), the verdict of the jury, and the findings of the district court affirmed by the Eleventh Circuit.

The relationship between Exxon and its dealers is governed by uniform sales agreements under which Exxon was entitled to fix the wholesale price of motor fuel. P.Ex. 54. Such "open price" term contracts for the sale of goods are governed by section 2-305 of the Uniform Commercial Code, enacted in each of the 35 jurisdictions in which Exxon sold motor fuel to its dealer network.

Section 2-305 "rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish." Uniform Commercial Code (U.L.A.) § 2-305(2) (Official Comment 3). Rather, the seller is required to fix prices "in good faith," which the U.C.C. expressly defines in both subjective and objective terms as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-305,

Official Comment 4 (referencing U.C.C. § 2-103(1)(b) definition of "good faith" between merchants).[1]

The origin of Discount for Cash, the program that gave rise to the claim that Exxon's pricing practices violated its obligation to set prices in good faith, was not, as Exxon claims, a "response to competitive pressure from companies that did not offer credit cards" (Pet. at 4). Exxon's internal business records and the admissions of its officers at trial established that Discount for Cash was, instead, a concerted plan to persuade dealers to alter the economics of their businesses so that Exxon could increase its wholesale margins, reduce dealer incomes, and "facilitate" store closings, which Congress had made more difficult with the passage of the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* ("PMPA").[2]

Exxon's incentive to use Discount for Cash to achieve these ends arose from the events immediately following termination of government-imposed price controls by President Reagan in 1981. Exxon, along with other major oil companies, immediately increased wholesale motor

1. Official Comment 3 to section 2-305 states that the obligation to price in good faith is met "in the normal case" by a "price in effect" or the like. What is or is not "normal" or a "price in effect" are questions that turn on the facts and circumstances of each case.

2. The PMPA does not prohibit oil companies from closing stores, but requires companies like Exxon to allow terminated dealers to purchase their stations at fair market value. But as Exxon reduced its dealer network from 8,000 to 2,000 stores during the Class period, the last thing Exxon wanted was competition from its own former dealers in their own former stores. P.Ex. 53; Doc. 1535 Tr. 1876.

fuel prices. P.Ex. 21.[3] Exxon quickly discovered, however, that the competitive marketplace was also an unwelcome constraint on its prices.

After suffering huge losses of volume, market share, and as much as $100 million in revenue, Exxon was forced to lower its prices below what it wanted to charge. P.Ex. 21, 55. Analyzing its loss, Exxon discovered that vis-a-vis its major competitors, its brand value was weak, its retail chain was aged, and its business was concentrated in unprofitable markets. P.Ex. 55, 67; Doc. 1532 Tr. 1098-1102; Doc. 1535 Tr. 1887-93. Other companies had invested in their retail networks during price controls, Exxon had not. P.Ex. 67.

Exxon concluded that its service station dealers were making, on average, $9,000 per year (or 1.3 cents per gallon) "too much," and observed that when Exxon raised its wholesale prices, its dealers were able to protect their profits by increasing retail prices and margins on reduced volumes. P.Ex. 22, 56. This dealer trade-off forced Exxon to lower its prices to protect its market share. P.Ex. 21. Exxon decided that it needed to eliminate the dealers' ability to resist wholesale price increases and, at the same time, accelerate its plans to reduce dramatically the size of its dealer network. P.Ex. 22, 26, 53, 56; Doc. 1532 Tr. 1113, 1116. Exxon divided its dealers into "keepers" and "non-keepers" and anticipated that, because of the PMPA, unilateral store closings for the non-keepers could be "contentious." P.Ex. 32, 34, 35, 55, 59; Doc. 1535 Tr. 1868-69.

Exxon calculated that it could increase its profits by $85 million per year at the expense of the dealers if it could persuade them to segment retail prices into a credit

3. References to the record below are denoted "P.Ex." for Plaintiffs' exhibits admitted at trial and "Doc. __ Tr. __" for the trial transcript.

price and a lower cash price (hence "discount for cash"). The source of that additional profit would be a new 3% "credit cost recovery fee" (a price increase with a different label) that Exxon would impose on the dealers on all credit card sales. *Id.*

The key economic assumption of DFC was the price elasticity of demand. P.Ex. 22, 24, 67; Doc. 1532 Tr. 1109-1112. Segmenting retail prices into cash and credit prices would increase the price elasticity of demand of the products the dealers were selling to the public. *Id.*; P.Ex. 24, 69; Doc. 1537 Tr. 2645. Increasing price elasticity, Exxon calculated, would make it impossible for dealers to protect their own profits by taking higher retail margins on lower volumes, the behavior which forced Exxon, in 1981, to lower wholesale prices to protect its market share. *Id.*

Exxon's *internal* business plan provided that in the "short term," Exxon would impose the credit cost recovery fee and offset the fee with "on average" wholesale price reductions. P.Ex. 22, 23, 24, 26, 28; Doc. 1532 Tr. 1136-60, 1219-21; Doc. 1533 Tr. 1521-35. But in the "long term," when the overwhelming majority of its dealers had segmented their prices, Exxon would "recoup" the price reduction and "eliminate the short term requirement to reduce the [wholesale price]." *Id.*; P.Ex. 25, 47.

There was no dispute at trial that market forces would preclude dealers from protecting their own profits by passing on the new fee to their customers. Exxon's economics expert testified at trial:

> Under such economic conditions, if Exxon's retailers were subjected to the alleged overcharge or duplicative charge marketplace forces would preclude the formulaic pass through of such an

> overcharge or duplicative charge and would cause the resulting burden to be borne all or in substantial part by Exxon's retailers.

P.Ex. 69; Doc. 1541 Tr. 3773.

In August 1982, Exxon rolled out DFC nationwide to its dealers and the public. To induce its dealers to participate in this program that would actually harm their economic interests, Exxon developed a highly sophisticated marketing campaign. Exxon represented that DFC was good for the dealers' businesses because it would increase sales and profits while leaving dealer margins "unchanged." P.Ex. 29; 29B; 30; Doc. 1532 Tr. 1222-28. And Exxon promised that the new 3% credit cost recovery fee was merely an incentive to segment prices; it would not be a new cost because the fee would be offset with on-average wholesale price reductions. *E.g.*, P.Ex. 29; Doc. 1532 Tr. 1224.

Exxon unilaterally amended its standard form credit card agreement with all dealers to impose the 3% fee (P.Ex. 29A), and immediately lowered its wholesale prices by an offsetting amount. Doc. 1532 Tr. 1255. Exxon communicated the specifics of the program and the promised wholesale price offset uniformly to all dealers. Doc. 1532 Tr. 1222, 1276, 1285-86.[4] All of Exxon's communications carefully used the same words to describe the promised price offset:

> Exxon will remove from the dealer DTT

4. Proof of the specific and uniform representation was established from Exxon's rollout presentation, videotapes, brochures, dealer newsletters, press releases, Congressional testimony of Exxon officials, written materials provided to the dealers, written materials provided to consumer groups, public advertisements, Exxon's interrogatory answers, and the admissions of Exxon's witnesses. P.Ex. 29, 29A, 29B, 30, 39, 40, 71, 72, 156, 170, 282; Doc. 1532 Tr. 1222-28, 1234, 1276-79, 1285-86.

> [wholesale price] an amount which *on average* offsets the charge for credit to the dealer.

P.Ex. 29; *see also* P.Ex. 30, 39, 40, 72, 156, 170, 264, 282. In answers to Plaintiffs' interrogatories, Exxon explained that, because the pricing environment was dynamic, performance of its obligation to reduce prices "on average" must be measured "on average, over time and across markets." P.Ex. 39 (R.App. 11a-15a), P.Ex. 40.

The overwhelming majority of Exxon dealers demonstrated their belief in Exxon's representations by adopting DFC at retail. Doc. 1531 Tr. 942, 946. Approximately seven months after DFC was rolled out, however, and consistent with its "long term" plan, Exxon eliminated the offset. P.Ex. 2, 5, 5A, 5B, 9, 32, 33, 34, 35, 36, 37; Doc. 1537 Tr. 2684-85, 2693-95, 2738. Exxon was able to hide the effective price increase by simply lagging the market in reducing its prices during a period when oil prices were falling generally. P.Ex. 37; Doc. 1535 Tr. 2051. From March 1983 until the DFC program was ended in August 1994 (days after class certification), Exxon failed to provide the offset to the credit cost recovery fee. P.Ex. 2, 4, 5, 5A, 5B; Doc. 1537 Tr. 2667-2695.

Like its internal DFC plan, Exxon's actual wholesale prices were always a closely guarded secret available only to a small number of employees at Exxon's headquarters in Houston. P.Ex. 377. Without access to Exxon's actual wholesale prices to all dealers, no dealer or group of dealers could meaningfully question whether Exxon provided the on-average price reduction, or utilize what Exxon called the "on average, over time and across markets" means of measuring Exxon's performance. Thus, although the fortunes

of Exxon dealers declined under DFC, as Exxon had planned, the dealers lacked the means to know why.

Throughout the life of the program, Exxon continuously and formally assured the dealers that they were receiving the offset, P.Ex. 73, 74, 75, 76, 77, 79, 80, 81; Doc. 1532 Tr. 1080, 1223-24, 1240, Doc. 1533 Tr. 1395, 1476, 1486, 1488, and that the offset was provided to all dealers regardless of whether they participated in DFC. Doc. 1531 Tr. 942. Beginning in 1991, Exxon placed a line item for the DFC offset (*i.e.*, a stated price reduction of 1.3 cents per gallon) on every dealer motor fuel invoice. P.Ex. 50; Doc. 1533 Tr. 1402.[5]

Another important vehicle used by Exxon to promote DFC and keep dealers in the program was an organization Exxon had established called the National Dealer Advisory Council ("NDAC"). In his opening statement to the jury, Exxon's counsel aptly described the NDAC as "almost like a legislature." Doc. 1531 Tr. 923.

Each year, the NDAC held local and regional meetings and then an annual national meeting in Houston, attended by designated dealer representatives from around the country.

---

5. At trial, Exxon advanced the argument that it had provided the offset by creating a price comparison to its competitors' prices. It contended its prices, "adjusted" for discount for cash, were "equal to or lower than its competitors' prices throughout every market." That argument was proven to be meritless for many reasons, among which was the indisputable fact that Exxon did not know what its competitors' prices were, since all of the real wholesale prices of Exxon's competitors, as distinguished from "posted" prices, were closely guarded secrets which Exxon was unable to obtain by virtue of corporate confidentiality and the antitrust laws. Doc. 1532 Tr. 1077-78; Doc. 1535 Tr. 1863.

Doc. 1532 Tr. 1062-63, 1244-45; Doc. 1533 Tr. 1431-32. In all of these meetings, Exxon and its dealers discussed their mutual concerns and Exxon communicated company policies and objectives. *Id.* Following the national NDAC meetings, the dealer representatives went back to their regions and reported to the local dealers on what had transpired in Houston. *Id.* In addition, minutes of NDAC meetings were maintained by Exxon and mailed to all dealers throughout the country. P.Ex. 73-77, 79-81, 84; Doc. 1532 Tr. 1062-63, 1240, 1244.

Each year the NDAC representatives asked whether Exxon continued to provide the offset for the credit fee. Every year until this suit was filed, Exxon assured them that it did, going so far as to provide complex charts and graphs purporting to depict the offset. Doc. 1532 Tr. 1080, 1223-24; Doc. 1533 Tr. 1395, 1476, 1486, 1488; Doc. 1535 Tr. 2014-15, Doc. 1537 Tr. 2387-88. The same staff members who prepared charts for NDAC meetings falsely showing the offset was provided, simultaneously generated for Exxon senior management internal "before DFC" and "after DFC" graphs showing precisely the opposite. P.Ex. 32, 33, 34, 35, 60; Doc. 1535 Tr. 2015-18.

The event that triggered this lawsuit occurred in a confrontational NDAC meeting in Houston in November 1990, which began with an opening statement from the NDAC to Exxon stating "you have abandoned us." P.Ex. 84. As at all previous NDAC meetings, the dealer representatives asked if Exxon was still providing the offset for the 3% credit fee. Doc. 1532 Tr. 1080. Unlike all the earlier meetings, however, the NDAC representatives thought they heard Exxon's new senior vice president of marketing say that the credit cost recovery fee offset had not been provided in the

past but that he, new to the job, would make sure it was provided in the future (an admission Exxon vigorously denies). Doc. 1537 Tr. 2499-2501. The dispute about the officer's words set off a firestorm. This lawsuit was filed in the federal court a few months later, in May 1991.

At trial, all of Exxon's witnesses admitted that it would not be in good faith or "normal" to fail to provide the promised offset, and conceded Exxon's legal obligation to perform. Doc. 1536 Tr. 2170; Doc. 1540 Tr. 3679-80. The testimony of Exxon's senior vice president of marketing is illustrative:

> Q: Would you agree with me that it would not be good faith for Exxon to promise its dealers for twelve years that it had provided a price reduction and not provide it?
>
> A: I would agree with that. (Doc. 1532 Tr. 1087-88).
>
> * * *
>
> Q: Do you believe it is normal for a company like Exxon to tell its dealers that the offset is being provided and not provide it?
>
> A: No. (Doc. 1532 Tr. 1089).
>
> * * *
>
> Q. So, is it a legal obligation to provide the offset?

> A. It's a statement we made, it's a moral obligation, it's good faith. I think that makes it a legal obligation, yes. (Doc. 1533 Tr. 1537).

Having conceded the existence of the obligation to the Class, Exxon's senior vice president of petroleum marketing also agreed that the only real issue at trial was whether Exxon had in fact performed the obligation:

> Q. So really, the issue is did you provide it, did you provide the offset?
>
> A. Exactly. (Doc. 1532 Tr. 1179-80).

The Course of Proceedings

In August 1994, the Magistrate Judge recommended class certification. App. 223a. In October 1995, the first district court judge certified the case as a Rule 23(b)(3) class action. App. 221a. In ensuing stages of the pretrial proceedings, Exxon twice filed motions to decertify and also petitioned the Eleventh Circuit for mandamus to reverse class certification. All were denied. App. 168a, 215a.

Exxon filed motions for summary judgment which included challenges to Plaintiffs' ability to prove aspects of their claim on a class-wide basis. All were denied. After the initial trial judge's death, the new district judge allowed Exxon to renew all of its previously denied motions. They were again denied with lengthy reported orders concluding that Plaintiffs had established an adequate basis to try duty and breach (61 F. Supp. 2d 1308) and damages (61 F. Supp. 2d 1335) on a class-wide basis. After the district court, *sua sponte*, required additional briefing on the

class-wide determination of Exxon's defenses, the district court entered an additional order with respect to these issues. 188 F.R.D. 667 (App. 172a).

The case was tried to a jury in 2001, ten years after it was brought. The jury returned a unanimous special verdict establishing Exxon's liability and damages on an annual cents-per-gallon basis with respect to each gallon of motor fuel Exxon sold to the Class during the class period (the sum of the credit cost recovery fees collected divided by the total gallons as to which Exxon failed to provide the DFC offset). App. 160a. The district court denied Exxon's post-trial motions, finding more than sufficient evidence to support the verdict. R.App. 1a-15a.

Post trial, over Plaintiffs' objection, the district court adopted the claims administration process Exxon had proposed. Thereunder, a court-appointed Rule 53 special master would calculate the damage awards of individual class members by multiplying the cents-per-gallon damage award of the jury verdict times the gallons of motor fuel purchased by each class member during the class period as reported in Exxon's undisputed sales records. 157 F. Supp. 2d at 1308, 1325. Contrary to Exxon's petition (Pet. at 26), the only issues to be resolved by the special master are ownership of claims, duration of ownership, and any set-offs Exxon asserts against individual dealers. 157 F. Supp. 2d at 1324.[6] The damage factor established by the jury in the special verdict and the number of gallons sold to each dealership is not at issue. *Id.*

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6. In view of the anticipated appeal on the issue of supplemental jurisdiction, the trial court also ordered that the special master would identify those claims that did not meet the jurisdictional minimum. *Id.* at 1325.

Exxon explicitly waived jury trial of the claims to be administered by the special master. Exxon declared: "Exxon will agree as part of this process to waive any right to a jury trial that it might have in connection with such proceedings." R.App. 16a-28a at 22a n.25. In a subsequent hearing before the district court on the claims process, Exxon's counsel reiterated the jury trial waiver, "we have already waived our right to jury trial in that process." Doc. 1426 Tr. 100.

The district court certified the jury verdict, its denial of Exxon's Rule 50 motions, and the order implementing the claims administration process for interlocutory review. A panel of the Eleventh Circuit affirmed. App. 67a. Exxon's petition for rehearing *en banc* was denied, with two circuit court judges dissenting solely on supplemental jurisdiction. App. 1a.

REASONS FOR DENYING THE PETITION

1. There is no Circuit Court Conflict or Other Compelling Reason for the Court to Exercise Discretionary Review of Class Certification

The Eleventh Circuit Opinion

Exxon asserts that discretionary review of class certification is needed for this Court to provide guidance to wayward courts' improper application of Rule 23(b)(3) in multi-state class actions. But since Circuit Judge Peter Fay's widely cited decision in *State of Alabama v. Blue Bird Body Co. Inc.*, 573 F.2d 309 (5th Cir. 1978) almost thirty years ago, the Eleventh Circuit as well as the other circuits have recognized that certification under Rule 23(b)(3) requires a rigorous examination of the manner in which class plaintiffs

propose to prove their claim on a common basis in accordance with the applicable state law. *See, e.g., Andrews v. American Tel.&Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741-742 (5th Cir. 1996) (citing *Blue Bird Body* and decisions from Second, Third, Fourth, Sixth, and Seventh Circuits reversing class certifications on this ground).[7] The district court met the *Blue Bird Body* requirement in this case.

After a long, careful and thoroughly documented analysis of the facts and state laws applicable to the claim, the district court determined that class certification was appropriate. A panel of the Eleventh Circuit affirmed. In denying Exxon's petition for rehearing *en banc,* not a single member of the Eleventh Circuit agreed with Exxon's position on this issue.

Exxon characterizes the Eleventh Circuit's decision as authorizing "the certification of a multi-state class action where individual reliance by each class member is at issue and where the predominance of common issues can be established only by distorting the law of the applicable states" (Pet. at i). Not only does the opinion contain no such ruling, certiorari is not available to review determinations of fact, *Exxon Co. U.S.A. v. Sofec Inc.*, 517 U.S. 830, 841 (1996), or to challenge lower courts' interpretations of state law, *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Moreover, Exxon's characterization of the facts, procedural history and state law is wholly unsupportable.

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7. Judge Fay was one of the three members of the panel of the Eleventh Circuit in this case that rejected Exxon's class certification argument.

Exxon Created the "on-average" Obligation to the Class

Arguing that "the dealers were allowed to transform their individual claims into a special 'classwide breach' claim, under which individual prices and contracts were deemed irrelevant" (Pet. at 23), Exxon ignores the fact that it created the "on average" pricing obligation and the means to measure its performance – "on average, over time and across markets." In response to this argument below, the district court described it as "a 'smoke-screen' to hide from its own self-created obligation established during the creation and implementation of the DFC Program." R.App. at 6a.

Exxon Waived Jury Trial in the Claims Process

Exxon continues to mis-state the record in complaining that the district court deprived it of a jury trial in the claims administration process (Pet. at 26). Exxon authored the procedure about which it complains and expressly waived its right to a jury trial on any fact issues arising from claim ownership issues. R.App. at 22a n. 25. Having urged the matter below, Exxon cannot seek review on this purported error. *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 704 (1999).

U.C.C. § 2-305 is Uniform

Exxon's argument that district court altered state law to avoid supposed variations under U.C.C. section 2-305 (Pet. at 27) is equally misguided, as Exxon failed to preserve this issue below thereby precluding certiorari review. *Glover v. United States*, 531 U.S. 198, 205 (2001).

In addition, the cases on which Exxon now relies show no disparity in the operation of section 2-305. Three of the six cases Exxon cites for the proposition that section 2-305 is not uniform involve the law of states which are not part of this class action (Ohio, Michigan and Kansas), the fourth does not even mention 2-305 (*Exxon Corp. v. Superior Court*, 60 Cal.Rptr. 2d 195, 204-205 (Cal. Ct. App. 1997)), the fifth makes no particular distinction between objective or subjective good faith (*Havird Oil Co. v. Marathon Oil Co.*, 149 F. 3d 283, 290-91 (4th Cir. 1998)), and the sixth applied the dual standards of subjective and objective good faith as expressly defined in the U.C.C., just as the district court did in this case. *Richard Short Oil Co. v. Texaco Inc.*, 799 F.2d 415, 422 (8th Cir. 1986).[8]

Exxon's quarrel with the district court's jury instruction over what is "normal" under U.C.C. section 2-305 invites deconstruction of the district court's careful analysis of how the relevant states interpreted the Official Comments of the Code provision. Such an undertaking would be extraordinary for this Court, and is entirely unnecessary here, because, by any definition, Exxon's behavior cannot be viewed as "normal." As the district court noted in denying Exxon's Rule 50 motion on this point, "Exxon's own company representative and expert witness testified on cross

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8. Exxon also maintains that the district court disregarded state law in concluding that Exxon's standard form termination release does not bar class member's claims, but Exxon ignores the principal ground for the court's ruling which was based upon a plain reading of the exceptions set forth in the release. One exception is for claims on "trade accounts" defined in the release as "monies due and owing either party associated with motor fuel purchases"; another exception is for "reimbursement", the dictionary definition of which is "to pay back." 188 F.R.D. at 680-81 nn. 24 & 26, 684.

examination that, if Exxon had in fact done what Plaintiffs claimed Exxon had done, it would not be a 'normal case.'" R.App. at 5a.

There is No Conflict in Circuit Court Decisions Concerning Class Certification of Cases with a Fraudulent Concealment Avoidance to a Limitations Defense

Exxon's arguments on the fraudulent concealment issue fare no better. Exxon first relies upon inapposite federal decisions involving affirmative claims for fraud. While Exxon does identify two cases involving fraudulent concealment avoidances, the decisions reach different results based on their unique facts and circumstances, not on disparate rules of law. *See Broussard v. Meineke Muffler Shops Inc.*, 155 F.3d 331 (4th Cir. 1998) (reversing certification) and *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000) (affirming certification). *Meineke* reversed class certification because with respect to both plaintiffs' affirmative claims and their concealment avoidance, "five significant variations in franchisees' 'factual and legal arguments' make it clear that this case failed to present common questions of law or fact." *Id.* at 346. The *Meineke* Court concluded, "the class the district court certified was no more than 'a hodgepodge of factually as well as legally different plaintiffs' that should not have been cobbled together for trial." *Id.* at 343.

Waste Management, on the other hand, affirmed certification because common issues relating to plaintiff's affirmative claim for breach of warranty predominated over plaintiff's attendant fraud concealment avoidance, ruling that "predominance cannot be reduced to a mechanical, single issue test." 208 F.3d at 296. Thus, these decisions do not conflict on any rule of law. They simply reflect different

outcomes arising from the due application of the predominance requirement of Rule 23(b)(3).

In affirming class certification in this case, the Eleventh Circuit did not ignore state law or misapply Rule 23. Common issues overwhelmingly predominate over individual issues with respect to Plaintiffs' affirmative cause of action for breach of contract. And as to the fraudulent concealment avoidance, Exxon's limitations defense applies to only some class members and would bar only four years of a twelve year class period. Also, the avoidance focuses on Exxon's concealment, not the conduct of individual class members, further adding to the predominance of common over individual issues. *See, e.g., In re: Linerboard Antitrust Litigation Winoff Ind. Inc.*, 305 F.3d 145, 162 (3rd Cir. 2002) (the fact of concealment, that necessarily focuses on the defendant's conduct, is the polestar in an analysis of fraudulent concealment). And, reliance is an element of the concealment avoidance in just 11 of the 35 jurisdictions in issue. App. 185a.

Finally, Exxon argues a view of state law that the district court and the circuit court properly rejected. Every state decision Exxon cites involves an affirmative claim for fraud, not a concealment avoidance to a limitations defense. Most do not involve class actions. Exxon fails to identify a single state court decision ruling that a concealment avoidance cannot be determined on a class-wide basis. Three of the decisions cited are from jurisdictions in which reliance is not an element of the avoidance (New Jersey, Delaware, and Colorado).[9] And contrary to Exxon's assertion that a showing

9. *See Farrell v. Votator Div. of Chemetron Corp.*, 299 A.2d 394, 396 (N.J. 1973); *Resource Ventures Inc. v. Resources Management Int'l Inc.*, 42 F. Supp. 2d 423, 436 (D. Del. 1999); *Rosane v. Senger*, 149 P.2d 372, 375 (Col. 1944).

of personal reliance is always mandated, four of the jurisdictions (California, New York, North Carolina and New Jersey) have reported decisions concluding that reliance can be established on a class-wide basis.[10]

Exxon ensured that its false representations to the dealers' representatives in the NDAC were communicated to the dealer network at large. Contrary to Exxon's supposition, the law is clear that fraud worked upon an agent – here the dealers' NDAC representatives – establishes fraud as to the principal.[11] That the dealer representatives relied on the fraud on behalf of all dealers (as this was their role)was established by "clear and convincing" evidence. R. App. at 8a.

Because there is no genuine conflict in circuit court decisions and because duty, breach, and damages were all established at trial on a class-wide basis pursuant to uniformly applicable provisions of state law, there is no basis on this record for the Court to grant certiorari review of class certification.

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10. *See Vasquez v. Superior Court*, 484 P.2d 964 (Cal. 1971); *Super Glue Corp. v. Avis Rent-a-Car System, Inc.*, 132 A.D.2d 604, 607 (N.Y. App. 1987); *Pitts v. American Security Ins. Co.*, 550 S.E.2d 179, 189 (N.C. App. 2001); *Varacallo v. Massachusetts Mutual Life Ins. Co.*, 752 A.2d 807, 817 (N.J. App. 2000).

11. *See, e.g., Cheek v. Glover,* 1997 WL 601387 *3 (Ark. App. 1997); *Northwestern Bank v. Roseman*, 344 S.E.2d 120, 125 (N.C. App. 1986); *Dryden Waterproofing, Inc. v. Bogard*, 488 So. 2d 672, 673 n.1 (Fla. 4th DCA 1986); *Liberty Nat'l Bank & Trust Co. v. Gruenberger*, 477 S.W.2d 503, 505 (Ky. App. 1972); *El Paso Electric Co. v. Raynolds Holding Co.*, 100 S.W.2d 97, 100 (Tex. App. 1937); *Vulcan Detinning Co. v. American Can Co.*, 67 A. 339, 400 (N.J. 1907); Restatement (Second) of Torts § 533 (1976).

2. The Court Should Decline to Exercise Discretionary Review of Subject Matter Jurisdiction

Although there is conflict among the circuits on the issue of supplemental jurisdiction over those class members whose individual claims are less than the jurisdictional amount of the diversity statute, this case does not present an appropriate vehicle to review the issue.

The Parties' Interests are Not Properly Aligned

The traditional advocates for the competing positions giving rise to the conflict over the meaning of 28 U.S.C. § 1367 – the plaintiff's class action bar on the one hand, and the large, multi-national companies they routinely sue on the other – are not properly represented or aligned in this case. The plaintiff's class action bar has frequently sought to avoid federal jurisdiction over large, multi-state class actions against multi-national corporations like Exxon. Exxon is hardly the appropriate standard bearer for those interests. Indeed, Exxon maintains that "most class actions belong in federal court" and regularly criticizes the class action bar for taking the very position that Exxon espouses here.[12] Nor are Plaintiffs appropriately cast as the spokesman of the

12. While this case was pending, Exxon donated its periodic space on the op-ed page of the New York Times to an article entitled "Class Action Bullies" which argued that "most class actions belong in federal courts." The article asserts that "more and more, class actions have been hijacked by trial attorneys to extract not justice but big settlements," and that, "in most cases, the class claimants receive little of value while the lawyers make millions." The advertisement concludes with support for the Class Action Fairness Act (which has passed the House and is pending in the Senate) which would resolve the circuit court split by providing federal jurisdiction over all large multi-state class actions and bring "some measure of common sense to a system that now enshrines trial lawyer abuse." The article is available on Exxon's website at: http://www.exxonmobil.com/files/corporate/000525.pdf.

world's multi-national corporations which are typically anxious to avoid the state court forums that class action plaintiff's lawyers favor.

In addition to advancing a position contrary to its documented political views, Exxon has no financial stake in the outcome of the issue here one way or the other. Even if Exxon "prevails," class members with claims in excess of the jurisdictional amount (whose claims account for 90 percent of the Class's monetary recovery) will remain in the federal court. And if dismissed, the class members with claims less than the jurisdictional amount would refile in state court on a claim for which Exxon's liability has already been adjudicated.[13]

The integrity of the our adversarial system depends on parties having a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult [] questions." *Baker v. Carr*, 369 U.S. 186, 203 (1962) (discussing Article III standing requirement). If the Court undertakes to resolve the circuit conflict over supplemental jurisdiction, it should choose a case where the parties are appropriately aligned and best suited to advance the pros and cons of both sides of the debate.[14]

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13. 28 U.S.C. § 1367(d) tolls the statute of limitations pending the final determination of supplemental subject matter jurisdiction. Exxon will be collaterally estopped from relitigating its liability in state court proceedings.

14. Plaintiffs will not add further here to the volumes of argument previously devoted to the debate over the correct interpretation of 28 U.S.C. § 1367 other than to say that the majority of the circuit courts decisions, and the Eleventh Circuit have correctly concluded that the text of the statute clearly conveys jurisdiction in the circumstances presented here.

This Case is a Poor Vehicle for Review and There is an Independent Ground for Subject Matter Jurisdiction

In addition, after over thirteen years of contentious litigation, Exxon's liability has been conclusively established. Breaking the case into parts at this juncture makes little sense. If Exxon is correct as to the importance of the jurisdictional issue and its recurring nature, there will be better opportunities for this Court take review, particularly since early interlocutory review of class certification is now available under Rule 23(f).

Finally, certiorari review is also unnecessary because Plaintiffs have advanced an independent and alternative ground for subject matter jurisdiction over the entire Class. The nature of the duty created by Exxon to rebate the proceeds of the 3% credit cost recovery fee with "on average" wholesale price reductions was, by definition, owed to the Class as a whole. Exxon's breach of its duty caused damage to the Class as a whole. Numerous courts have recognized that the claims of individual plaintiffs may be aggregated in order to satisfy the jurisdictional amount of the diversity statute when suit is brought on a "common and undivided" interest which "exist[s] . . . when the defendant owes an obligation to the group of plaintiffs as a group and not to the individuals severally." *See, e.g., Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1262 (11th Cir. 2000); *Eagle v. American Tel. & Tel. Co.*, 769 F.2d 541, 546-57 (9th Cir. 1985); *Berman v. Narragansett Racing Assoc.*, 414 F.2d 311 (1st Cir. 1969).

Because of the "on average" obligation Exxon created, any dealer attempting to recover against Exxon individually would necessarily have to prove that Exxon failed to provide the price reduction with respect to the Class as a whole. Under these circumstances, the nature of the obligation is

collective,[15] and aggregation to satisfy the jurisdictional amount of the diversity statute is permitted.

CONCLUSION

The petition for certiorari should be denied on both grounds advanced. Should this Court entertain review on the issue of supplemental jurisdiction, Plaintiffs would urge the Court to expressly limit review to that narrow issue, allowing the claims process for the remaining claims – which represent 90 percent of the total damage award – to proceed without further delay.

Respectfully submitted,

EUGENE E. STEARNS*
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
150 West Flagler Street
Suite 2200
Miami, FL 33130
(305) 789-3200

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY & ALLEN, P.A.
150 West Flagler Street
2000 Museum Tower
Miami, FL 33130
(305) 371-2223

* *Counsel of Record*

Counsel for Respondents

15. Although the district court did not find jurisdiction under this theory (App. 110a), the Court may take this alternative ground into consideration. *E.g., Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 476 n.20 (1979).

APPENDIX

APPENDIX A — ORDER DENYING EXXON'S RULE 50 AND 59 MOTIONS FILED AUGUST 7, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-GOLD/SIMONTON

ALLAPATTAH SERVICES, INC., et. al.,

Plaintiffs,

v.

EXXON CORPORATION,

Defendant.

ORDER DENYING EXXON'S RULE 50 AND 59 MOTIONS

Exxon has filed a "Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial" [D.E. # 1439].[1] For reasons stated in this Order, Exxon's motion is denied.

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1. Exxon claims it is entitled to judgment as a matter of law because: (1) the jury found that Exxon did not have the only pricing obligation on which plaintiffs sought to introduce evidence; (2) there is no legal or factual basis from which to find a contractual pricing obligation that does not require Exxon to provide an offset to each dealer; (3) there is no legal or factual basis from which to conclude that Exxon and any dealer agreed to the "on average" pricing (Cont'd)

Appendix A

I. STANDARDS UNDER FED. R. CIV. P. 50 AND 59

Rule 50 authorizes entry of judgment as a matter of law when "there is no legally sufficient evidentiary basis for a reasonable jury to find for the party." The governing Rule 50

(Cont'd)

obligation; (4) there is no legal or factual basis from which to conclude that Exxon's duty of good faith required the "on average" pricing obligation; (5) there is no legal or factual basis from which to conclude that this is not the "normal case" under U.C.C. § 2-305; (6) there is no evidence from which a reasonable jury could find that Exxon failed to offset credit card fees; (7) Exxon is entitled to judgment as a matter of law on its statute of limitations defense; and (8) Exxon is entitled to judgment as a matter of law on its release defense. In the alternative, Exxon moves for a new trial because, (1) the jury's verdict was against the great weight of the evidence; (2) the jury's verdict was inconsistent; (3) the jury's verdict was the product of confusion and sympathy caused by the improper introduction and use of irrelevant and prejudicial evidence; (4) the Court improperly admitted the expert testimony of plaintiffs' expert, Dr. Fishe; and (5) the Court improperly instructed the jury on the legal standards applicable to plaintiffs' claims and Exxon's defenses. Although not discussed individually in extensive detail, the Court has reviewed each ground asserted and concludes that it lacks merit.

Moreover, a number of Exxon's contentions raise legal issues previously addressed by prior orders of this Court. The Court declines to once again address these issues and simply relies on its prior opinions. See, e.g., April 21 1998, *Order Denying Exxon's Motion for Summary Judgment on Count I* (Kehoe, J.) (D.E. # 908); *Allapattah Servs. Inc. v. Exxon Corp.*, 61 F.Supp.2d 1300 (S.D. Fla. 1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1326 (S.D. Fla. 1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1335 (S.D. Fla. 1999); *Allapattah Servs., Inc. v. Exxon Corp.*, 188 F.R.D. 667 (S.D. Fla. 1999).

Appendix A

test in the Eleventh Circuit is whether there is substantial evidence to support plaintiffs' claims such that a reasonable jury could find in plaintiffs' favor. *United States Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221, 114 S.Ct. 2710 (1994). That is, a judgment as a matter of law may be granted "only if the facts and inferences 'point so overwhelmingly in favor of the movant . . . that reasonable people could not arrive at a contrary verdict.'" *Bogle v. Orange County Bd. of County Comm'rs*, 162 F. 3d 653, 656 (11th Cir. 1998) (quoting *Richardson v. Leeds Police Dep't*, 71 F.3d 801, 805 (11th Cir. 1995)). But, if the jury verdict is supported by substantial evidence such that reasonable minds could differ concerning material facts, and not just by a mere "scintilla" of evidence, then the motion should be denied, *U.S. Anchor Mfg.*, 7 F.3d at 993.

A Rule 59 motion for new trial may only be granted when the jury's verdict is against the great weight of the evidence. *Carter v. Decision OneCorp.*, 122 F.3d 997, 1004 (11th Cir. 1997). This rule, however, does not grant a license to the trial judge merely to substitute his or her judgment for that of the jury on questions of fact. *Ard v. Southwest Forest Indus.*, 849 F.2d 517, 520 (11th Cir. 1988). Consequently, when considering a motion for new trial, the trial judge may weigh the evidence, but it is proper to grant the motion only if the verdict is against the great, not just against the greater, weight of the evidence. *Id.* Motions for new trial on the basis of erroneous and prejudicial jury instructions are committed to the discretion of the trial court and reviewed to ascertain whether there has been a clear abuse of discretion. *Hicks v. Talbott Recovery Sys., Inc.*, 196 F.3d 1226, 1242 (11th Cir.

1999) (citing *Christopher v. Cutter Labs*, 53 F.3d 1184, 1190 (11th Cir. 1995)).

II. APPLICATION OF THE STANDARDS

Upon review, I conclude there was clearly sufficient evidence to support the jury's verdict such that a reasonable jury could find in Plaintiffs' favor, and, therefore, that the jury's verdict cannot be said to be against the great weight of the evidence. Nor was the jury's verdict conflicting, or, in my view, based on improper jury instructions or improper prejudicial evidentiary rulings.

Under the instructions, the jury first had to ascertain if this was a "normal case" under the Uniform Commercial Code, such that Exxon could not satisfy its duty of good faith by reliance upon the establishment of the "dealer price" or "price in effect" specified in the Dealers' Sales Agreements. The jury found that the Dealers had proven, by a preponderance of the evidence, that facts and circumstances existed during the Discount for Cash Program ["DFC"] that were not the "normal case." (D.E. # 1395, p. 2]. The jury's decision was based on substantial evidence, although reasonable minds could differ. Based on this evidence, the jury was well within its discretion to conclude, as Plaintiffs contended, that it would not be "normal" for Exxon to have assured its dealers for the years of the DFC Program that credit cost recovery fees were being offset with, on average, wholesale price reductions, while secretly carrying out a business plan to eliminate the offset, thereby enhancing its own profits, reducing the dealers' profits, and, at the same time, eliminating a majority of its dealers throughout the

various markets because it was faced with potentially contentious store closings in an environment where dealers might want to exercise their new rights under the PMPA. Indeed, Exxon's own company representative and expert witness testified on cross-examination that, if Exxon had in fact done what Plaintiffs claimed Exxon had done, it would not be a "normal case." [Carter, Tr. p. 1089/4-7; Kalt, Tr. p. 3680/1-11].

Next, the jury was asked to determine if Exxon set its wholesale motor fuel prices to its Dealers in "good faith" during the DFC Program. To do so, the jury was first asked to find the nature and extent of Exxon's good faith obligation to the Dealers during the Class Period, based on the preponderance of the evidence. It did so. It found, as Plaintiffs' contended, that Exxon, based upon its own representations to its Dealers, was required to reduce the wholesale price of motor fuel by an amount that, on average, offset its 3% credit cost recovery fee. [D.E. # 1395, p. 3]. Exxon now contends that its is entitled to judgment as a matter of law because the jury found that Exxon did not have the only pricing obligation Plaintiffs sought to prove Exxon breached. This is incorrect. Although Exxon did its best to confuse the jury as to its obligation to its dealers with the tests used to prove or disprove its performance, Plaintiffs presented the jury with substantial evidence from Exxon's own documents and words that it would reduce the wholesale price of motor fuel charged to its Dealers during the Class Period by an amount that, on average, offset the 3% credit card recovery fee. The evidence further established that Exxon agreed to do so even if a dealer did not adopt and implement the DFC Program. The tools used by Plaintiffs to

prove non-performance of the pricing obligation do not redefine the obligation. In the Court's view, Exxon's argument regarding conflict in the verdict form is a "smoke-screen" to hide from its own self-created obligation established during the creation and implementation of the DFC Program.

Once the jury established the nature of the good faith obligation, the next essential question was whether the Plaintiffs proved by a preponderance of the evidence that Exxon failed to set its wholesale prices of motor fuel to its dealers in good faith. Both Plaintiffs and Exxon agreed that Exxon initially did set its prices in good faith by implementing the DFC Program as it represented. Exxon's defense was that it continued to do so [although it argued it was not "obligated" to do so]. Exxon's representative conceded at trial that if Exxon failed to continue to offset its wholesale prices as represented, it would not have acted in good faith; that is, it would not have acted honestly and by observing reasonable commercial standards of fair dealing as required by the Uniform Commercial Code. [Carter, Tr, p. 1087/23-1097/8].

The jury concluded that Exxon did not act in good faith, and that it failed to reduce its wholesale prices in the manner described from March, 1983, through August, 1994 [when the DFC Program was discontinued] [D.E. # 1395, pp. 5, 9-11]. The jury also found that Exxon was obligated under its individual dealer contracts to do so. [*Id.* at 6]. So, the crucial question in the case boiled down to the following: Did Exxon "take back" the offset that it initially had implemented? That is, was the jury's finding of Exxon's

"breach" based on substantial evidence such that a reasonable jury could find in Plaintiffs' favor? The Court concludes that Plaintiffs provided substantial evidence to the jury to establish breach from which a reasonable jury could base its verdict. The evidence that Exxon "took back" the offset and breached its duty of good faith came in two forms. First, Plaintiffs offered Exxon's own internal business records to show Exxon's "secret plan" to remove the offset, and its success in carrying out the plan to fruition. From these documents, a reasonable jury could conclude that Exxon intended to "recoup the offset" and thereby make $85 million a year in additional annual profits from its dealers. Evidently, the jury was unpersuaded by Exxon's failure to explain away its "short term-long term" DFC planning documents, especially when the drafters of the documents did not testify. The documents left unanswered the clear implication that Exxon's plan was to remove the offset in the long term, and a reasonable jury could so find.

Second, the Plaintiffs offered expert testimony, through Dr. Fishe, to establish that the breach occurred. Dr. Fishe utilized statistical tests to measure Exxon's non-performance of its "on-average obligation," including margin analyses, which Exxon recognized as a viable measure of performance. In performing his analysis, Dr. Fishe relied upon Exxon's own business records, and other analysis, as has been outlined in the Court's Daubert order [D.E. # 1176], By the *Daubert* order, the Court previously found Dr. Fishe's methodologies to be sufficiently reliable. While Exxon's expert, Dr. Kalt, offered contrary opinions, it was the jury's function to conclude which was more credible and persuasive.

Next, the jury's calculation of a damage factor for each year of the DFC program was based on substantial evidence. The "cents-per-gallon damage calculation" was based on the premise, already found by the jury, that no offset was provided from March, 1983, to August, 1994. The damage factor was a function of the total number of gallons sold during each year of the Class Period in relation to Exxon's adopted DFC standard in existence during that year.

Finally, the jury had before it "clear and convincing evidence" that Exxon fraudulently concealed its breach to avoid litigation against it. The evidence was more than "clear and convincing" that year after year, dealer representatives inquired at national meetings whether the offset was being given. They were assured by Exxon's top officials that it was. There was ample proof of dissemination of the misrepresentation by the representatives to dealers throughout the United States.

With regard to Exxon's new trial motion, the Court concludes that no improperly prejudicial evidence was admitted relative to dealer rent, dealer profitability, or the decline in Exxon dealers. All of these matters were otherwise relevant to issues in the cause and, on balance, were not unduly prejudicial.

Rather, when all is said and done, Exxon had a duty of good faith to its dealers. That duty of good faith, under the circumstances of the case, required Exxon to do that which it said it would do, when it persuaded its dealers to modify the way they priced at retail. Exxon was obligated to remove from the wholesale price of motor fuel an amount sufficient,

on average, to offset credit charges. The jury, based on substantial evidence, found that Exxon breached its obligation by not doing so from March, 1983, through August, 1994. The jury also found, based on clear and convincing evidence, that Exxon fraudulently concealed that breach. It awarded damages based on an appropriate factor to be applied to each individual class dealer. There are simply insufficient grounds for judgment as a matter or law or for a new trial.

WHEREFORE, it is

ORDERED AND ADJUDGED that Exxon's Rule 50 and 59 motions [D.E. # 1439] are **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 7 day of August, 2001.

s/ Alan S. Gold
ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

c.c. U.S. Magistrate Judge Andrea M. Simonton

Eugene E. Stearns, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
Facsimile: (305) 789-3395

Sidney Pertnoy, Esq.
Pertnoy Solowsky Allen & Haber, P.A.
Facsimile: (305) 373-2073

Appendix A

Gerald M. Bowen, Esq.
Facsimile: (703) 481-9250

Larry S. Stewart, Esq.
Stewart Tilghman Fox & Bianchi, P.A.
Facsimile: (305) 358-4707

Robert G. Abrams, Esq.
Robert J. Brookhiser, Jr., Esquire
Howrey Simon Arnold & White, LLP
Facsimile: (202) 383-6610

Robert B. Wallis
Exxon Corporation
Facsimile: (713) 656-4994

APPENDIX B — DEFENDANT EXXON CORPORATION'S SUPPLEMENTAL ANSWERS TO PLAINTIFFS' SECOND SET OF INTERROGATORIES TO DEFENDANT EXXON CORPORATION RE: FIRST AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-KEHOE

ALLAPATTAH SERVICES, INC., et al.,

Plaintiffs,

v.

EXXON CORPORATION,

Defendant.

DEFENDANT EXXON CORPORATION'S SUPPLEMENTAL ANSWERS TO PLAINTIFFS' SECOND SET OF INTERROGATORIES TO DEFENDANT EXXON CORPORATION RE: FIRST AMENDED COMPLAINT

INTERROGATORY 1

Exxon stated, *inter alia*, in response to Request for Admission No. 42 that:

> [I]t can be verified that through its pricing methodology, Exxon reduced its wholesale

> gasoline prices to Exxon's dealers by an amount which, on average, offsets the charge for credit to Exxon's dealers. . . .

Is it your contention that such verification may be accomplished by making any wholesale to wholesale comparison?

RESPONSE

It can be verified through Exxon's pricing methodology that Exxon reduced its wholesale gasoline prices to dealers by an amount which, on average, offsets the charge for credit to its dealers. Comparison of Exxon's wholesale prices with the wholesale prices of its competitors provides additional evidence which confirms that Exxon reduced its wholesale prices to its dealers by an amount which on average offsets the charge for credit to its dealers.

INTERROGATORY 2

If you contend that the verification referred to in the preceding interrogatory may be accomplished by making any wholesale to wholesale comparison, (1) identify with specificity the wholesale prices to which Exxon's DTT would be compared, (2) state in quantitative terns the comparison which you claim would demonstrate the verification (*See e.g.* quote from Exxon document set forth in interrogatory No. 5, *infra*, "*operate with LR parameter ~2.8¢; UR parameter ~3.8¢*" referring to comparison of DTT versus rack), and (3) identify the documents from which the prices may be derived for such comparison.

RESPONSE

2,1. Exxon's pricing methodology used the dealer wholesale prices of its other major oil company competitors. Exxon's methodology used the cash prices for those competitors who priced on a cash basis and calculated cash prices for those competitors who priced on a credit basis.

2, 2. The fact that under the Discount for Cash Program Exxon reduced *its wholesale gasoline prices can be* objectively verified from Exxon's Wholesale Price Development System and the adjustments that Exxon used to set dealer wholesale prices. In that system, Exxon used a wholesale to wholesale comparison as the basis to set its prices.

Exxon sought to price, on average, over time and across markets, competitive with the the net prices of its key competitors. Standard statistical analysis (ie., of differences, means and/or ranges) will show that Exxon's net prices were comparable with (approximately equal to) the net prices of Exxon's key competitors. Because net prices already subtract from credit competitors' prices the DFC adjustment; a net price comparison demonstrates that Exxon provided the discount for cash reduction.

In addition, wholesale price comparisons show that Exxon provided the wholesale price reduction. Statistical analysis will demonstrate that, on average, over time and across markets, Exxon's wholesale prices were below the prices of its key credit competitors by the amount of the discount for cash adjustment. In short, the data will show

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that Exxon priced in the cash market and below the credit market.

The data will also demonstrate that Exxon's wholesale prices were comparable to the wholesale prices of its key cash competitors. Statistical analysis will show that, on average, over time and across markets, Exxon's prices were comparable with (approximately equal to) the prices of these competitors, all of which charged a credit card processing fee.

In addition, comparative over time analysis of Exxon's prices will show that Exxon changed its prices in direct response (*i.e.*, with reasonable timeliness and in comparative amounts) to changes in the prices of its key competitors', either actual or calculated. Significant and high correlation in the changes in Exxon's prices relative to its key competitors' prices demonstrates that Exxon's prices were the result of a cash basis pricing methodology and this pricing methodology genuinely effectuated a cash DTT.

These price comparisons will be the subject of expert testimony. Exxon will provide a summary of that testimony in accordance with the Court's scheduling order.

2,3. The documents and data from which the prices may be derived are the Exxon Wholesale Price Development System (Mogas Dealer Monitors, Mogas Market Adjustment Reports and Motor Gasoline Price Monitors) and the Exxon pricing database, which have previously been produced to plaintiffs, as well as independent pricing information available from Lundberg for the period August 1982 - August 1994.

Appendix B

Robert G. Abrams
HOWREY & SIMON

Rene J. Mouledoux
EXXON COMPANY, USA.

s/ Larry S. Stewart
Larry S. Stewart
STEWART TILGHMAN
FOX & BLANCHI, P.A.
Sun Trust International Center
One Southeast Third Avenue
Suite 3000
Miami, Florida 33131-1764

Harley S. Tropin
KOZYAK TROPIN &
THROCKMORTON, PA.

Attorneys for Defendant
EXXON CORPORATION

Dated: November 15,1996

APPENDIX C — EXCERPTS FROM RESPONSE OF EXXON CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF ORDER ON PROCEDURE FOR DETERMINATION AND ENTRY OF FINAL JUDGMENT DATED MAY 11, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., et al.,

Plaintiffs,

v.

EXXON CORPORATION,

Defendant.

RESPONSE OF EXXON CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF ORDER ON PROCEDURE FOR DETERMINATION AND ENTRY OF FINAL JUDGMENT

Exxon Corporation submits this response in opposition to plaintiffs' motion for entry of an order on procedures for-determination and entry of final judgment.

* * *

Appendix C

VI. EXXON'S PROPOSED POST-TRIAL PROCEDURES

As is evident from the foregoing discussion, Exxon believes that the Court should now proceed with a claims administration process that would consist of a claims period, a process for determining the validity of any contested claim and the entry of a Final Judgment. It should be a process in which Exxon participates with the right to raise all proper issues or objections. A proposed order for that process is attached as Exhibit B.

In addition, the Court should enter an order on the jury's special Verdict. It should not be a Final Judgment because .there has been as yet no resolution of damages due to the individual class members. This case is not different from a determination on summary judgment or a verdict in the first phase of a bifurcated trial. In those circumstances, no final judgment can be entered until after damages have been determined. *See n.2*. Exxon's proposed order is attached as Exhibit C.[19]

---

19. While Exxon proposes that an "Order" be entered, it could be entitled an "Interim Judgment" so long as the operative language makes clear that it is not a Final Judgment. Although not a Final Judgment, this Court could utilize the procedure in 28 U.S.C. § 1292(b) to authorize an immediate appeal. *See, e.g., Steering Committee v. United States*, 6 F.3d 572 (9th Cir. 1993) granting review for "all liability issues"; *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 479 F.Supp. 1118 (E.D.N.Y. 1978) holding that the determination of the liability phase of multiparty litigation constituted a controlling question of law for the purposes of 28 U.S.C. §1292(b). If the Court were disposed to enter such an Order, Exxon would file its Rule 50 and Rule 58 motions so that, if denied, those rulings could be incorporated into the § 1292(b) order.

A. Procedures for Determining Damages Due to Individual Class Members

Plaintiffs recognize that it will be necessary to conduct further proceedings in which notice is sent to members of the class, class members wishing to claim damages must submit proof of claim forms and the damages suffered by each individual class member are determined. The award of damages to an individual class member will involve: (i) identifying the station or stations at which the class member was a dealer, (ii) determining the time period during which the class member was a dealer at that station, and (iii) multiplying the gallons of gasoline sold to the station during that period by the measure of damages applicable during that time period.[20]

The Court should not assume that there will be clear and unambiguous records of who were dealers or the times that they were dealers. While plaintiffs have variously referred to the class as consisting of "10,000 dealers", *See, e.g.*, Trial Tr. pp. 262, 263 and 914, the exact size of the class has never been known and, given the passage of time and the condition of the records, it probably never will be known. That is because while Exxon has computerized records which show sales by month by station, Exxon did not keep and does not have comprehensive computerized records or summaries of the time periods that particular individuals were dealers at

20. By submitting its proposal for a post-trial claims process, Exxon does not waive its objections to the jury's verdict or its claim that it is entitled to either Judgment as a Matter of Law or a new trial.

specific stations. As a result, there is no readily available list of class members or records of times when each class member was a dealer.[21]

Exxon does have individual dealer files archived in storage. However those files were not established or maintained for litigation purposes and only contain documents generated in the ordinary course of business. The only way to obtain information from those files is by manual review and to date that has not been done on a systematic basis by either Exxon or plaintiffs[22]. Exxon has, however; done spot checks of some files -- as where, for example, dealers were listed as potential trial witnesses - and the results show it is likely that in a significant number of those files the records will be incomplete. It will therefore be necessary that individual class members who wish to submit claims produce records, such as copies of their Sales Agreements (or other types of evidence), which demonstrate the time periods during which they were dealers at a particular station.

Under the circumstances, there will undoubtedly be claims that will be incomplete, especially in the early years of the DFC program. There will also undoubtedly be instances of disputes between class members regarding the identity of

21. This was disclosed ins detail in 1996 in connection with producing data for the original notice to the class. *See, e.g.*, Exxon Corporation's Notice of Filing dated Nov. 21, 1996, Doc. En. 598.

22. The dealer files were made available to the plaintiffs in 1997. Due to the logistics involved, while plaintiffs examined some files, they declined to systematically review all the files.

the dealer at a station during a particular tine period[23] or disputes about which dealer owns the claim for a particular station.[24] In order to resolve such disputes and for other reasons, *see* Fed. R. Civ. P. 17, each class member submitting a claim must also provide evidence that he is the real party in interest with regard to the Sales Agreements on which his claims are based (i.e. that he is-the individual, corporation, partnership or other entity that was the party to the Sales Agreements that give rise to the claim). And, there will have to be an adjudicatory process to determine all disputes and resolve conflicting claims together so all parties have notice and an opportunity, to be heard.

To establish a claims process to handle and adjudicate class member claims Exxon submits that the following should occur:

1. *Claims handling process.* The Court should direct the Clerk of the Court to meet, or his designee representative to meet, with the parties to develop a process for the filing, handling and administration of the individual

23. For example, two dealers may have been dealers at the same station during a particular year. To avoid duplicative recovery, it will be necessary to determine the precise dates during which each was a dealer at that station. Because Exxon's station records only contain monthly data on fuel volumes, there may also be disputes between such dealers over the particular gallonage to which each is entitled.

24. For example, a dealer who sells or assigns his rights under a Sales Agreement to a new dealer may (or may not) have reserved any claims he has in this litigation. If so, it will be necessary to determine which dealer is the owner of the claim under the Sales Agreement.

class member claims. Said meeting should occur within 15 days (or such other time as the Court directs) and the Clerk of the Court should 'be directed to report to the Court within 30 days thereafter his proposed procedures for the handling of individual class member claims. The parties should have 15 days thereafter in which to file any objections or counter proposals.

2. *Class Notice.* The parties should be directed to meet and confer within 15 days (or such other time as the Court directs) concerning the form of notice to be provided to class members to start the claim process: The notice should include a claim form and information concerning what supporting documents or data is to be supplied with the claim. Exxon submits that at a minimum the claims should be notarized and should include proof that the person or entity submitting the form was an Exxon dealer during the class period; proof that the person or entity submitting the claim has the- capacity to sue; the identity of the station or stations at which the claimant was an Exxon dealer; and the period of time at which he was an Exxon dealer at each station.

In addition to the form of notice and claim form; the parties should also be directed to confer on the following:

a. The time within which class members shall have to submit claims. Exxon submits that the period should be 60 days.

b. The time within which Exxon shall have to file objections to claims, including objections based on the Court's rulings on limitations and releases.

Within the objection period Exxon should also identify any claims it has by way of set-off against the claims submitted by any class member. Exxon submits that this period should be 60 days.

If the parties agree on some or all of the foregoing, they should report to the Court within 15 days of their meeting. To the extent there is no agreement, plaintiffs should submit their Proposals within 15 days. Exxon should respond within 15 days.

3. *Court Decisions.* To the extent necessary, the Court should resolve any issues or disputes arising from the above procedures and set a schedule for class notice, the period for filing claims and the time for Exxon objections.

4. *Adjudicatory Process.* The parties should be further directed to meet and confer within 60 days (or such other time as the Court directs) for the following purposes:

a. Determination of a process by which incomplete or conflicting claims requiring adjudication are identified so that notice can be given and conflicting claims can be adjudicated together.

b. Determination of a non-jury process[25] to resolve objections and competing claims. The subjects to be covered for this process should include use of a Magistrate or Special Master;

25. Exxon will agree as part of this process to waive any right to jury trial that it might have in connection with such proceedings.

the types of proof or evidence which may be considered; the rules of evidence to be applied; and the form of order to be utilized for decision.

c. Determination of a process to establish the "Good Faith" amount of claims for purposes of the Court's jurisdiction under 28 U.S.C. § 1332.[26]

The parties shall report to the Court their agreements or positions on the adjudicatory process within 30 days of their meeting.

5. *Discovery re Interest Calculations.* At the March 1, 2001 Status Conference, plaintiffs announced that they had retained Gary Gross as an "accounting expert" to "calculate interest for each of the thirty five states". Tr. at p. 14, 15. Mr. Gross was initially disclosed by plaintiffs as an expert witness on January 27, 1997, Doc. En. 669,[27] but was withdrawn when Exxon sought to take his deposition. When plaintiffs reintroduced Mr. Gross at the March 1, 2001 Status Conference and stated that they intended to rely on work he had performed, Exxon stated that it wanted discovery of his work. Plaintiff responded:

26. Even if the Court does not revisit the issue of subject matter jurisdiction, determination of the "Good Faith" amount of claims can save judicial labor because, with that information in the record, the Eleventh Circuit Court of Appeals could fully resolve the issue without any neeessity for remand.

27. The expert "report" filed in 1997 made no mention of any interest calculations.

> MR. STEARNS: And we agree with that, Your Honor. When Mr. Gross is finished with his report, we would give his report on interest, and assuming Mr. Stewart wants to depose him, we agree, he should be deposed.

Tr. at p. 46, 47.

Provisions need to be made for production of Mr. Gross's report and supporting documents and a time set for his deposition.

B. Entry of Judgment

Once the claims process has been initiated, all agreed to claims should be certified to the Court for entry of a Final Judgment. Adjudicated claims should also be certified to the Court for the same purpose. At the conclusion of the claims process; the Court should then enter a Final Judgment for the total amount of all individual claims for compensatory damages plus prejudgment interest as applicable.

CONCLUSION

For all of the foregoing reasons, the Court should reject plaintiffs' motion and enter the orders submitted by Exxon. A proposed order for denial of the plainttiffs' motion is attached as Exhibit D.

Respectfully submitted,

Robert G. Abrams
HOWREY SIMON
ARNOLD & WHITE, LLP

Robert B. Wallis
EXXON CORPORATION

Larry S. Stewart
STEWART TILGHMAN
FOX & BIANCHI, P.A.
Suite 3000
SunTrust International Center
One Southeast Third Avenue
Miami, FL 33131-1764

Attorneys for Defendant
EXXON CORPORATION

By: s/ [illegible]
An Attorney for
Exxon Corporation

Dated: May 11, 2001

Appendix C

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-0986-CIV-GOLD

ALLAPATTAH SERVICES, INC., et al.,

Plaintiffs,

v.

EXXON CORPORATION,

Defendant.

PROPOSED ORDER ON SCHEDULE FOR FURTHER PROCEEDINGS

THIS CAUSE came before the Court for adoption of post-trial proceedings following the Special Verdict of the jury. After due consideration in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. The parties are directed to meet with the Clerk of the Court or his designated representative within fifteen (15) days of the date of this Order for the purposes of developing a process for the filing, handling and administration of individual class member claims in this matter. Within thirty (30) days of said meeting the Clerk of the Court is directed to report to the Court on his proposed procedures for the

Appendix C

handling of said claims. The parties shall have fifteen (15) days thereafter to file any objections or counter-proposals.

2. The parties are further directed to meet and confer within fifteen (15) days from the date of this Order concerning the form of notice to be provided to class members to start a claim process. The notice should include a claim form and information concerning what supporting documents or data is to be supplied with the claim. In addition, at the same time, the parties are directed to confer concerning the time within which class members shall have to submit claims and the time within which Exxon shall have to file objections or setoffs to claims. To the extent that the parties agree they should report to the Court within fifteen (15) days of their meeting. To the extent there is no agreement, plaintiffs shall submit their proposals within fifteen (15) days and Exxon shall respond within fifteen (15) days.

3. Following submission of the matters referred to in paragraphs 1 and 2, the Court shall set a schedule for class notice, the period for filing claims and the time for Exxon's objections.

4. The parties are further directed to meet and confer within sixty (60) days of the date of this Order for purposes of establishing a process for (a) determination of a method by which incomplete or conflicting claims requiring adjudication are identified; (b) determination of a non jury process for adjudication of such claims; and (c) determination of a process to establish a good faith amount of claims. The parties shall report to the Court within thirty (30) days of their meeting concerning their agreements or positions on said matters.

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5. The plaintiffs are directed to serve and file the expert report of Mr. Gary Gross within thirty (30) days from the date of this Order and to arrange for Mr. Gross's deposition by Exxon within thirty (30) days thereafter.

DONE AND ORDERED in Chambers at Miami, Florida this ___ day of _____, 2001.

_____

UNITED STATES DISTRICT JUDGE

(3)

No. 04-70

Supreme Court, U.S.
FILED
AUG 31 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

August 31, 2004

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs acknowledge the mature conflict among the circuits on the question whether federal courts with diversity jurisdiction have supplemental jurisdiction over the individual claims of class members that do not satisfy the amount-in-controversy requirement. Opp. 21. And, plaintiffs do not dispute that this question of federal jurisdiction is recurring and important. Indeed, another petition raising the closely related question whether a federal court with diversity jurisdiction has supplemental jurisdiction over the individual claims of multiple parties that do not satisfy the amount-in-controversy requirement is also pending before this Court. See Petition for Certiorari, *Ortega* v. *Star-Kist Foods, Inc.*, No. 04-79 (U.S. filed July 16, 2004). Instead, ignoring that the courts below decided the supplemental-jurisdiction issue without encountering any obstacles, plaintiffs cite three reasons that this case is not "an appropriate vehicle to review the issue." Opp. 21. All lack merit.

Plaintiffs' initial contention is that the Court should not grant the petition because the parties' legal positions do not match their institutional profiles. Exxon, a large corporation which usually favors federal-court jurisdiction over class actions, seeks state-court jurisdiction, while the class is represented by class counsel who usually favor state-court jurisdiction. This is no reason to deny review where both parties clearly have concrete, substantial interests in pressing their positions. Plaintiffs' related contention – that Exxon lacks a sufficient stake to seek certiorari because its liability would be the same in federal and state court – is also wrong. Exxon has an obvious interest in the resolution of claims against it by a court with power to do so. Moreover, the federal judgment of liability, based on an improper conflation of the laws of several states, should not bind individual state courts which would apply their own law to plaintiffs' state-law claims. It is also uncertain who would file a state-law

claim, whether a state court would certify a class in this matter, or how state-court jurisdiction would alter aggregate damages. Finally, plaintiffs' alleged alternative ground for supplemental jurisdiction here was rejected below, and is clearly wrong. This case thus provides the Court with an excellent opportunity to resolve an issue bedeviling the courts of appeals for years.

The same is true for the class-action issue presented here. Plaintiffs make no serious case for the proposition that all is well and settled in the world of class-action litigation, and it is not. Recent events demonstrate how dangerous it is certify a nationwide class asserting state-law claims. Even though the class members' claims are governed by the laws of 37 different states, the district court certified a single, nationwide class of dealers by literally inventing a single liability standard that bears no relation to the conflicting liability standards actually applied in the various states' laws. Just last week, the Texas Supreme Court adopted, as applicable to "open price" term claims under U.C.C. § 2-305 like those asserted in this case, a standard that directly conflicts with the standard applied by the courts below. But, because the nationwide class certification here presupposed the application of a single standard that *ignored* state law, the Texas-based claims in this case will *not* be governed by Texas law – an irrational result that violates both Exxon's rights and the federalist principles that bind federal courts sitting in diversity. The example is merely illustrative: the standard adopted last week by the Texas Supreme Court is the majority rule *already* applied in the various states.

Thus, this case is an object lesson in the lengths to which some courts will go to facilitate all-or-nothing nationwide litigation, even when the class members' claims would be treated differently if litigated individually in the states in which they arise. Plaintiffs' opposition brief, in turn, illustrates the lengths to which *they* will go to avoid review of

the important class-action procedural issues presented here. Plaintiffs mischaracterize the Petition and the precedents but, in the end, cannot deny that the lower courts sorely need guidance concerning the proper application of Rule 23's requirements. The petition should be granted.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE MEANING OF THE SUPPLEMENTAL JURISDICTION STATUTE.

As noted, plaintiffs acknowledge that the supplemental-jurisdiction issue is worthy of review and limit their opposition to three meritless attempts to show that this case is not a perfect vehicle.

Plaintiffs' first argument that the petition should be denied rests on an extraordinary syllogism: (i) Exxon is a large corporation, and plaintiffs are represented by the class-action bar; (ii) large corporations generally prefer federal jurisdiction over class actions, while the plaintiffs' class-action bar generally prefers state courts; and (iii) thus, Exxon is not an "appropriate standard bearer" for state-court jurisdiction over class actions, and class counsel is not "appropriately cast as the spokesman of the world's multinational corporations." Opp. 21-22.

Initially, it is nonsensical to argue that because Exxon often prefers to be in federal court, it is somehow disabled from arguing effectively in favor of state-court jurisdiction in a particular case where the issue has been decided adversely to Exxon, to its substantial detriment. If proof were needed, Exxon's persistent litigation of the issue at every possible stage in this case entirely belies plaintiffs' contention.[1]

---

[1] To support the argument that Exxon "regularly criticizes the class action bar for taking the very position that Exxon espouses here," Opp. 21, plaintiffs cite an article not by Exxon, but by the American Tort Reform Association. *Id.* at 21 n.12. Moreover, plaintiffs cite nothing in support of their insinuation that Exxon's general support for the Class Action

Moreover, plaintiffs' counsel cannot file a case in federal court, defend federal jurisdiction over all unnamed class members' claims, and then convincingly assert in this Court that their institutional interests now preclude a vigorous defense of that legal position. Under our Constitution, courts decide particular cases and controversies. See Const. art. III. Absent estoppel or an ethical violation by counsel (neither is asserted here), the parties' legal and political predispositions are not relevant to whether a petition should be granted.

Second, plaintiffs claim that "Exxon has no financial stake in the outcome of the issue here" because state courts would be required, as a matter of law, to conclude that Exxon is liable for breach of contract. Opp. 22. Critically, indeed dispositively, Exxon has an evident, important stake in having claims decided only by a court with the power to do so. In addition, plaintiffs' claims arise under state law; the question of whether, and the extent to which, a state court would be bound by the federal courts' liability decision is entirely unclear. See generally 18B Wright et al., *Federal Practice and Procedure* § 4472, at 379 (2d ed. 2002) ("[A]lthough federal law must ultimately control the choice, . . . it is frequently appropriate to incorporate state preclusion rules into federal preclusion rules for federal judgments on state-law questions"). As the Petition shows (23-28), in deciding plaintiffs' claims, the federal court applied generalized, invented rules of law – not the individual state laws that should have governed plaintiffs' claims. See also *infra* at 7-10. Exxon would strongly contest preclusion based on federal *or* state-law principles. See *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979). Nor can plaintiffs know who will file state-court actions, whether the state courts will certify class actions, or the effect of state-court jurisdiction on aggregate damages. Thus, the notion that Exxon lacks a sufficient "'personal stake in the outcome of th[is] controversy'" to

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Fairness Act, S. 2062, 108th Cong. (2004), somehow precludes Exxon from defending its interests in this specific case.

have standing to pursue its jurisdictional challenge (Opp. 22) is obviously wrong. Exxon is subject to a judgment that may potentially result in a liability of millions of dollars, providing Exxon with a strong, concrete "interest" in overturning the federal court's wrongful exercise of supplemental jurisdiction.

Finally, plaintiffs contend that the Court should not take this case because an alternative ground supports the exercise of supplemental jurisdiction. Specifically, plaintiffs argue that the class has a "'common and undivided interest'" in the money judgment rendered because Exxon "'owe[d] an obligation to the group of plaintiffs as a group and not to the individuals severally.'" Opp. 23 (quoting *Morrison* v. *Allstate Indem. Co.*, 228 F.3d 1255, 1262 (11th Cir. 2000)). The short answer is that the argument was rejected by both lower courts. See App. 110a ("Is this a 'Common Fund' Case Upon Which a Aggregate Final Judgment Can Be Entered? The answer is 'no.'") (emphasis in original omitted); *id.* at 77a-80a (refusing to enter "an aggregate final judgment in this case"). Distinguishing the same cases cited by plaintiffs, the district court explained:

> [W]hat is missing to create a 'common fund' is the *res* itself, such as a piece of land, an insurance policy, a lien, or an item of collateral, which the plaintiffs might claim as common owners or in which they might share a common undivided interest arising under a single title or right. . . .
>
> . . . .
>
> Plaintiffs may not equate a class member's interest in the total damage award sought by the class with the "joint and undivided" interest in a single claim or "res," as required by *Morrison*, and thereby justify entry of an aggregate judgment. [App. 110a-111a.]

None of the reasons plaintiffs cite for denying review withstands even cursory scrutiny.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE MEANING AND PROPER APPLICATION OF RULE 23.

Plaintiffs rest their opposition to review of the class action question largely on a superficial defense of the merits of the class certification order: Exxon treated its dealers as a class, plaintiffs aver, so it necessarily follows that class certification was proper. *Plaintiffs'* theory, however, is that Exxon adopted the DFC program not because it wanted to treat all dealers tne same, but because it wanted to treat them *differently*. Opp. 5 (discussing Exxon's asserted division of dealers into "'keepers' and 'non-keepers'").

This inconsistency in plaintiffs' position effectively highlights the fundamental legal flaw in the class certification order here: by forcing Exxon to deal with the dealers' claims on an all-or-nothing basis, the order deprived Exxon of the opportunity to assert viable defenses against each individual dealer's claim. For instance, under plaintiffs' theory that Exxon breached "its obligation to reduce prices 'on average' . . . 'over time and across markets,'" Opp. 8, it is necessarily true that many dealers *did* receive the benefits of a price reduction. Plaintiffs' point is that some did (the "keepers") and some did not (the "non-keepers"), and that Exxon left so many in the latter category that, *on average*, the dealers "as a class" did not receive the benefits of the DFC offset. But if Exxon had been allowed to defend against the claims on an individualized basis, it would have been permitted to show that given dealers received the benefits of a price reduction during the class period. But, when individual claims are amalgamated under a theory of "on average" classwide price reductions, then the meritless individual claim of a dealer who received a full price reduction is counterbalanced by the claims of two dealers who did not; and yet all three somehow walk away with damages from Exxon.

The class-action device was originally intended to facilitate the litigation of small-value individual claims that otherwise would not be brought. In this case, it was used to facilitate the litigation of *large*-value individual claims (plaintiffs say the vast majority are over $50,000) that otherwise *would not exist*. That is a perversion of Rule 23.

This is equally true with respect to Exxon's key affirmative defenses. Plaintiffs do not deny that Exxon would have an irrefutable statute of limitations defense against many of the class claims had they been brought individually, unless the individual dealer could establish all the elements of fraudulent concealment to avoid the statute of limitations. But rather than require each individual dealer to provide individual proof, the courts below certified a class and allowed dealers to prove those elements on a single-law, all-or-nothing basis. As the Petition explains, that decision conflicts directly with decisions of the Fourth and Fifth Circuits, which reject class certification where class members would be required to prove fraudulent concealment to equitably toll a statute of limitations, but conforms to decisions in the First and Third Circuits, which allow class certification in the same circumstances. Pet. 22-23.

Plaintiffs address only two of these cases,[2] and contend that the conflict between them is based on the "unique facts and circumstances" of the cases, "not on disparate rules of law." Opp. 18. That is incorrect. The Fourth Circuit decision established an unequivocal rule that "when the defendant's 'affirmative defenses (such as . . . the statute of limitations) may depend on facts peculiar to each plaintiff's case,' class certification is erroneous," *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) (omission in original) (internal quotation marks omitted), and the First Circuit expressly "reject[ed]" the Fourth Circuit's holding, *Waste Management Holdings, Inc.* v. *Mowbry*, 208 F.3d 288, 296 n.4 (1st Cir. 2000), which obviously would

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[2] Plaintiffs' assertion that only two decisions address limitations avoidance on concealment grounds (Opp. 18) is patently wrong.

have been unnecessary if the cases could be reconciled on factual grounds. As a careful reading reveals, the class-certification decisions turned fundamentally on the courts' conflicting judgments as to whether individual reliance issues conclusively preclude class certification.

The courts below answered that question "no," but only because they refused to follow the unambiguous requirement of many jurisdictions that an individual seeking to defeat the statute of limitations prove that he or she personally relied on the asserted misrepresentation. Pet. 25 & nn.6-8. Plaintiffs do not deny that the courts below refused to require proof of actual reliance by any individual dealer, even as they concede that such proof is an element of tolling in many jurisdictions. Opp. 19. In light of those positions, plaintiffs' statement that "the Eleventh Circuit did not ignore state law" in refusing to require proof of individual reliance, *id.*, is incomprehensible.

Plaintiffs weakly defend the refusal to require proof of individual reliance on the ground that in just four of the many jurisdictions that require proof of individual reliance, there are "reported decisions concluding that reliance can be established on a class-wide basis." *Id.* at 19-20. On its face that contention obviously does not justify the refusal to follow state law in *other* jurisdictions that reject a presumption of reliance in class-action cases. In any event, the cases plaintiffs cite are of little help to them: two are old cases that have been supplanted by recent authority in their respective jurisdictions clearly holding that where, as here, the disposition of class members' claims requires proof of personal reliance, such reliance will *not* be presumed, but must be proved by every class member. *Mirkin* v. *Wasserman*, 858 P.2d 568, 574 (Cal. 1993); *Reich* v. *Mitrani Plasterers Co.*, 701 N.Y.S.2d 368, 369 (N.Y. App. Div. 2000). The decisions below flatly override the state-law requirement of those two major jurisdictions. Plaintiffs cite two other lower court decisions from smaller states, holding that reliance may be "presumed" in the class-action context,

but nothing in Rule 23 authorized the courts in this case to impose such a principle on every claim, regardless of its state of origin. To the contrary, Rule 23 required those courts to respect and enforce the policy decisions of every state in which the dealers' claims arose, including those that preclude recovery on time-barred claims absent individual proof of reliance on asserted misrepresentations.

To avoid another legal disuniformity that would have precluded class certification, the courts below applied a lay dictionary definition of the word "normal" that cannot be found in any state's law applying the U.C.C. term of art "normal case."[3] In response, plaintiffs cite not one legal precedent justifying the application of a fabricated federal rule to each class member's state-law claims. Because all agree that that the definition of "normal case" applied by the courts below to facilitate classwide litigation is not derived from the law of *any* state, plaintiffs' effort (Opp. 17-18) to deny a conflict in state law over the definition of "normal case" is almost beside the point. Nevertheless, the Texas Supreme Court's recent opinion in *Shell Oil Co.* v. *HRN, Inc.*, No. 03-0555, 2004 Tex. LEXIS 740 (Tex. Aug. 27, 2004), on the "normal case" question starkly illustrates the deep flaws in the class-certification order here. Like this case, *Shell* involved a claim by gasoline dealers that an oil company had wrongfully employed a DFC program to drive them out of business. Cf. Opp. 4 (discussing Exxon's allegedly nefarious goals). In *Shell*, the Texas Court explicitly rejected the Fifth Circuit's holding in *Mathis* v. *Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002), that subjective bad faith alone suffices to make a case not "normal." The *Shell* Court followed the "majority of decisions" and held that, if the posted price is not commercially unreasonable or discriminatory, the case is per se "normal," *even if* there is an "'improper motive animating

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3 Plaintiffs' waiver argument (Opp. 16) is meritless. *See* Appellant's Br. in Nos. 01-15575-AA & 01-16244-AA, at 32-35 (11th Cir. filed Mar. 5, 2002).

the price-setter,'" including "dishonesty." 2004 Tex. LEXIS 740, at *12, *14, *16. The special lay-dictionary rule adopted by the courts below to facilitate nationwide class treatment of the dealers' pricing claims does not reflect that majority standard, and runs roughshod over the policy choices of the many states – such as Texas – that interpret U.C.C. § 2-305 to restrict proof of bad faith solely to objective evidence of actual prices charged.

Finally, plaintiffs misapprehend the jury-trial problem raised in the Petition. The point is not that "the district court deprived [Exxon] of a jury trial *in the claims administration process*." Opp. 16 (emphasis added). Instead, the class certification deprived Exxon of a jury trial *during the trial process*. Exxon's waiver of a jury trial on damages came *after* the trial, in which Exxon's "liability" had already been determined on a classwide basis. The problem is that the courts below, in certifying the class *before trial*, assumed that a jury could determine Exxon's "liability" separately from its "damages," with no risk to Exxon's right to mount an individualized defense to each dealer's claim before that jury. But in this context, damages and liability are *not* severable: Exxon owes an individual dealer damages only if Exxon "overcharged" that dealer, and Exxon thus is entitled to establish whether that dealer was, in fact, overcharged. Because the classwide treatment of plaintiffs' on-average pricing theory precluded Exxon from addressing the prices charged to individual dealers, it deprived Exxon of a jury trial on its liability to those individual dealers.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

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IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

EUGENE E. STEARNS*
STEARNS WEAVER MILLER
WEISSLER ALHADEFF
& SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, FL 33130
(305) 789-3200

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY
& ALLEN, P.A.
150 West Flagler Street
Suite 2000, Museum Tower
Miami, FL 33130
(305) 371-2223

Attorneys for Respondents

* *Counsel of Record*

189559

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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THE CIRCUMSTANCES REQUIRING SUPPLEMENTAL BRIEFING

Following the filing of Exxon's Petition and Respondents' Brief in Opposition, three decisions were published which have application to this case: *Shell Oil Co. v. HRN, Inc.*, 2004 WL 1908315 (Tex. Aug. 27, 2004); *Klay v. Humana, Inc.*, 2004 WL 1938845 (11th Cir. Sep. 1, 2004) (Tjoflat, J.)[1]; and *Olden v. Lafarge Corp.*, 2004 WL 1960157 (6th Cir. Sep. 7, 2004).

In *Shell Oil*, the Texas Supreme Court expressly approved the district court's analysis of Texas law in the present case as it pertains to U.C.C. § 2-305, rejecting Exxon's suggestion that Texas law regarding § 2-305 required a different result.

In *Klay*, the Eleventh Circuit discussed its opinion on class certification in this case and provided additional insight into why Exxon was unable to muster support for its Rule 23 argument from even a single member of that oft-divided court.

In *Olden*, the Sixth Circuit became the ninth circuit court to decide whether Congressional enaction of 28 U.S.C. § 1367 overruled the holding of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *Olden* joined the Fifth, Seventh, Fourth, Ninth, and Eleventh Circuits in the view that a plain reading of the unambiguous language of § 1367 compels the conclusion that *Zahn* has been overruled.

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1. Judge Tjoflat, of course, authored the opinion dissenting from the denial of rehearing en banc on the issue of supplemental jurisdiction in the present case.

Exxon asserted in its Petition – for the first time – that state law application of U.C.C. § 2-305 is not uniform.[2] In an attempt to illustrate its point with respect to this new issue, Exxon argued that *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002), had incorrectly applied Texas law with respect to U.C.C. § 2-305, and was contrary to decisions of other state courts interpreting § 2-305 (citing cases applying the law of states not part of this class action).

Exxon also asserted that the Fifth Circuit's interpretation of Texas law in *Mathis* was being reviewed by the Texas Supreme Court in *Shell Oil*, and intimated that the issue would likely be decided differently in that case (in which Exxon had filed an amicus brief). (Pet. at 27 n.10). Respondents, in turn, pointed out that regardless of the outcome of *Shell Oil*, none of the factors allowing sellers to enjoy the good faith safe harbor under U.C.C. § 2-305 were present in this case, as there was no possible interpretation of its statutory obligation of good faith that Exxon did not breach. (Opp. at 17-18).

Plaintiffs have been proven right. In *Shell Oil*, decided a few days ago, the Texas Supreme Court expressly concluded that the district court's application of Texas law with respect to U.C.C. § 2-305 was entirely *correct*:

> In *Allapattah*, another case involving a refiner and its dealer network, the dispute concerned the

2. Exxon argues that it did raise the issue below, citing its initial brief to the Eleventh Circuit, pp. 32-35. (Rep. at 9 n.3). However, the argument in those pages does not identify any differences in the manner in which states interpret or apply U.C.C. § 2-305. Nor did Exxon advance such an argument elsewhere in its appeal to the Eleventh Circuit or at any point in the proceedings before the district court.

calculation of a discount that was to be applied to the refiner's posted price. *Allapattah*, 61 F. Supp. at 1312-13. The refiner implemented a discount for cash program to offset the costs of credit card processing which the dealers alleged resulted in their being charged twice for the cost of credit. The court concluded that these allegations were not the normal case contemplated under section 2-305 if there was evidence that the refiner double charged to recover its costs of credit while representing to its buyers that its price was net of credit costs. *Id.* at 1322. The posted-price presumption did not apply, according to the court, because the dispute was not about price but rather the "manner in which the wholesale price was calculated without considering the double charge for credit card processing." *Id.*

> Both of these cases[3] recognize that a price, commercially reasonable on its face, may nevertheless be applied in a dishonest fashion. But in both of these cases, the allegation of bad faith resulted in a commercial injury distinct from the price increase itself.

Shell Oil, 2004 WL 1908315, at *5.

Notwithstanding the specific recognition and endorsement of the district court's decision by Texas' highest court, Exxon argues in its Reply Brief that *Shell Oil* supports its Petition. To say the least, it does not.

3. *Shell Oil* also favorably reconciled a Ninth Circuit decision, *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981) which concluded that a "posted price" did not satisfy the "normal case" presumption of U.C.C. § 2-305.

The observation in *Shell Oil* that "the allegation of bad faith [in *Allapattah*] resulted in a commercial injury distinct from the price increase itself" is well supported by the record. To induce its dealers to alter the way they priced at retail, Exxon promised its dealers that it would reduce wholesale prices to offset newly imposed credit charges. Exxon's senior officers admitted that this promise was uniformly communicated to the dealers and their representatives and amounted to an enforceable obligation under the U.C.C. At the same time Exxon was assuring its dealers that the offset was being provided, Exxon internally documented its intent to do the opposite and its success in doing so, thereby carrying out its long term objective of reducing the incomes of its "keeper" and "non-keeper" dealers alike. Finally, the test of performance of its obligation described by Exxon in its answers to interrogatories – a statistical analysis "on average, over time, and across markets" – proved Exxon's breach.

But for the fact that *Shell Oil* found for an oil company on a claim brought by dealers, there is no other relationship between the facts of *Shell Oil* and this case.[4] The bedrock of the decision in favor of Shell was that Shell's dealers stipulated that Shell "charged a posted price applied *uniformly* to all dealers," which was "within the range charged by other refiners to their dealers." *Shell Oil*, 2004 WL 1908315, at *2, 5 (emphasis added). The Texas court relied on both of those critical facts in concluding Shell was entitled to a "normal case" presumption of good faith under U.C.C. § 2-305.

4. For example, contrary to Exxon's brief (Rep. at 9), *Shell Oil* did not arise under a discount for cash program. Shell was the only major oil company that never implemented such a program.

By contrast, Exxon set prices which varied from dealer to dealer, region to region, and state to state.[5] Moreover, Exxon failed to demonstrate at trial that its wholesale prices were "within the range of" its competitors' prices.[6]

It therefore comes as no surprise that the Texas Supreme Court agreed with the district court's application of U.C.C. § 2-305 in this case.

KLAY v. HUMANA, INC.

In *Klay*, the Eleventh Circuit described in considerable detail the circumstances warranting or precluding class certification of breach of contract actions involving the laws of more than one state. In particular, the Eleventh Circuit recognized that "if a claim is based on a principle of law that is *uniform* among the states, class certification is a realistic possibility." 2004 WL 1938845, at *15 (emphasis added).

5. It was the myriad of Exxon's wholesale prices that led it to argue below that compliance with its obligation to reduce its prices by an amount sufficient to offset credit card fees was accomplished – and its performance should be tested – by an "on average, over time and across markets" analysis; an analysis Exxon unsuccessfully attempted to abandon when the statistical evidence applying Exxon's test proved its breach. Doc. 1532 Tr. 1187-92; Doc 1536 Tr. 2114-57; P. Ex. 39, 40.

6. Exxon offered dozens of trial exhibits purportedly reflecting that its prices were equal to or lower than its competitors' wholesale prices. These charts self destructed when Exxon's senior officers admitted that Exxon did not know its competitors' actual wholesale prices which are closely guarded corporate secrets, subject to a variety of hidden rebates, allowances, rent adjustments and discounts. Doc. 1532 Tr. 1187-96; Doc. 1536 Tr. 2114-65; Doc. 1541, Tr. 3823-25. Obviously, Exxon's comparison of its own prices to prices it did not know proved nothing.

In that case, the court determined that, because the numerous contracts sued upon contained many material differences, as did the various applicable state laws, class certification was not appropriate. *Id.* at *15-20. In doing so, however, the court specifically distinguished the present case, where certification was appropriate:

> This case stands in sharp contrast to *Allapattah*, 333 F.3d 1248, in which we affirmed certification of a class of approximately 10,000 Exxon dealers who sued Exxon Corp. for breaching their dealer agreements by overcharging them for wholesale fuel purchases. The dealers alleged that Exxon had promised them that it would reduce the price of gasoline by 1.7 cents per gallon, but secretly eliminated that price reduction after a few months. Exxon challenged the district court's certification of a class of all Exxon retailers, alleging "that there were individual issues inherent in each dealer's breach of contract claim and [Exxon Corp's] own affirmative defenses." *Id.* at 1261. We rejected this argument, holding: "Because all of the dealer agreements were materially similar and Exxon purported to reduce the price of wholesale gas for all dealers, the duty of good faith was an obligation that it owed to the dealers as a whole. Whether it breached that obligation was a question common to the class, and the issue of liability was appropriately determined on a class-wide basis." *Id.*

In *Allapattah*, Exxon cheated all of the plaintiffs in exactly the same way – by secretly eliminating its 1.7 cents per gallon price reduction. Once the plaintiffs proved that Exxon engaged in this behavior, each individual plaintiff's breach of contract claim was substantially advanced. In light of this classwide evidence, each individual dealer

> could demonstrate that Exxon violated his contractual rights simply by demonstrating that he had purchased gas from Exxon during the relevant time period. . . .

Id. at *20 (alteration in original).

OLDEN v. LAFARGE CORP.

In their opposition brief, Plaintiffs predicted that interlocutory review of class certification decisions would provide this Court with far better vehicles than *Allapattah* to resolve the circuit split on the issue of supplemental jurisdiction. In *Olden*, the Sixth Circuit has demonstrated that point.

The *Olden* decision by itself is unremarkable, having concluded as have five other circuit courts, that the plain language of 28 U.S.C. § 1367 dictates the outcome of this issue. Unlike *Allapattah*, however, *Olden* has not been pending for over thirteen years in litigation, the case is not otherwise concluded, most of the aggregate claim appears to be on behalf of claimants with claims below the amount for original diversity jurisdiction, the defendant's liability has not yet been yet determined for the smaller claimants regardless of the outcome of the jurisdictional issue[7] and the corporate defendant seeking to avoid federal jurisdiction has not purchased full page ads

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7. In its Reply brief, Exxon argued that it could still find many ways to frustrate its obligation to the smaller claimants (Rep. at 4), bringing to the fore Judge Tjoflat's discussion in *Klay*, that one of the reasons class treatment of a dispute may be a superior means of adjudication arises "when the defendants are corporate behemoths with a demonstrated willingness and proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings," 2004 WL 1938845, at *23. This, of course, sheds a different light on Exxon's argument that it should be applauded for having the resources to take this case to the absolute limit. (Pet. at 4).

in the New York Times advocating the opposite position, urging federal jurisdiction over all class actions.

If the Court wishes to resolve the now six to three split among the circuits, *Olden* demonstrates that there are more appropriate opportunities to do so.

CONCLUSION

These three recent decisions further defeat Exxon's attempt to castigate the Eleventh Circuit as a court run amok, improperly authorizing the distortion of state law to facilitate class certification. Hardly an avatar of plaintiff-friendly jurisprudence, the Eleventh Circuit has a demonstrated history of thoughtful opinions on the subject of class certification. The most recent, *Klay*, also evidences the wisdom in this Court's historical deference to lower courts in addressing issues of state law. In this case, both the circuit court and the district court have conscientiously performed that duty.

Respectfully submitted,

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY
& ALLEN, P.A.
150 West Flagler Street
Suite 2000, Museum Tower
Miami, FL 33130
(305) 371-2223

EUGENE E. STEARNS*
STEARNS WEAVER MILLER
WEISSLER ALHADEFF
& SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, FL 33130
(305) 789-3200

Attorneys for Respondents

* *Counsel of Record*

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IN THE

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EXXON CORPORATION,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

September 17, 2004

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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SUPPLEMENTAL BRIEF OF PETITIONER

Plaintiffs filed a supplemental brief to bring to the Court's attention the publication of three decisions addressing the two questions presented in this case. Petitioner Exxon files this supplemental brief to concisely refute plaintiffs' claims that these decisions somehow undermine the need for this Court's review.

1. In their supplemental brief, plaintiffs cite *Olden* v. *LaFarge Corp.*, No. 02-1148, 2004 WL 1960157 (6th Cir. Sept. 7, 2004), in which the Sixth Circuit becomes the *ninth* court of appeals to weigh in on the scope of the supplemental-jurisdiction statute. Six circuits have now concluded that the supplemental-jurisdiction statute authorizes federal courts with diversity jurisdiction to address the claims of unnamed class members that do not satisfy the amount-in-controversy requirement, while three circuits have reached the opposite conclusion. Spinning furiously, plaintiffs assert that the widening scope of the conflict shows that Exxon's petition need not be granted because *Olden* proves that the issue presented is recurring and gives the Court a better vehicle for resolution of the conflict. Leaving aside the fact that no petition for certiorari has been, or necessarily will be, filed in *Olden*, both the broadening of the conflict and the recurring nature of the issue strongly *support* the petition here. See Sup. Ct. R. 10. Plaintiffs' position – that the Court should grant any case but theirs to resolve the jurisdictional question – is based solely on the fact that they have already won and therefore hope that this Court will disregard the absence of jurisdiction over unnamed class members so that Exxon will have to pay. This circumstance supports rather than undermines the petition.

2. The other cases cited by plaintiffs illustrate the need for review even more starkly. To start, plaintiffs make no effort to show how the decision in *Shell Oil Co.* v. *HRN, Inc.*, No.

03-0555, 2004 WL 1908315 (Tex. Aug. 27, 2004), supports the lower courts' bizarre reliance on a lay dictionary definition of the everyday word "normal" to invent a new, uniformly applicable meaning for the legal term of art "normal case." In fact, as *Shell* shows, most – but not all – courts hold that when the price charged is in the range of competitors' prices and there is no price discrimination, the case is legally "normal" and a conclusive presumption of good faith applies. *Id.* at *4 ("[T]he majority of decisions suggest that a commercially reasonable DTW price, that is, one within the range of DTW prices charged by other refiners in the market, is a good faith price under section 2.305 absent some evidence that the refiner used pricing to discriminate among its purchasers."). But because taking that legal meaning of "normal case" seriously would have meant treating the individual class members' claims differently, the courts below rejected *all* relevant state-law authorities in favor of a common-parlance dictionary, from which they drew a new definition of "normal case" heretofore unrecognized in any U.S. state jurisdiction.[1]

Contrary to plaintiffs' submission, the *Shell* court's discussion of the district court's opinion in this case does not establish that the pricing claims in this case would be cognizable in Texas, even though Exxon's wholesale prices were indisputably within the range of competitors' prices. As is evident from the face of the discussion, the *Shell* court simply misunderstood the nature of plaintiffs' claims in this case. According to the *Shell* court, the dispute in this case is "not about price," because "the allegation of bad faith resulted

[1] Plaintiffs yet again assert incorrectly that Exxon failed to raise any Rule 23 issue with respect to the "normal case" inquiry. Resp. Supp. Br. 2 n.2. In addition to challenging the absurd lay definition of "normal case" that made class certification possible, Exxon C.A. Br. 32-35, Exxon also argued specifically that the "generalized treatment" facilitated by the lay standard of "normal" adopted by the courts "impermissibly glosses over the necessarily individualized issues with respect to each dealer," *id.* at 79.

in a commercial injury distinct from the price increase itself." *Id.* at *6. In fact, the dispute in this case is *only* "about price," and the commercial injury asserted by plaintiffs relates directly to "the price increase itself": Exxon charged a price that was "too high," plaintiffs aver, because its complicated pricing system included an improper double-charge for credit, which Exxon imposed (say plaintiffs) in order to drive some dealers out of business. Under the square holding of *Shell* (and hence the majority of decisions), however, because Exxon's DTW was within the range of the market,[2] plaintiffs could not make out such an overcharge pricing claim absent proof that the price charged was discriminatory. Plaintiffs obviously could not make that showing, but under the lay-dictionary rule invented by the lower courts to facilitate class certification, they did not have to.[3]

[2] Plaintiffs frivolously claim that "Exxon failed to demonstrate at trial that its wholesale prices were 'within the range' of its competitors' prices," citing the acknowledged and unexceptional fact that Exxon did not literally know exactly what its competitors' wholesale prices were, since such information is kept closely guarded. Resp. Supp. Br. 5 & n.6. But plaintiffs do not and could not dispute that Exxon's wholesale pricing system is based on a continuous and complicated process of *estimating* competitors' wholesale prices to the greatest extent possible. Nor did they contend that Exxon's wholesale prices were outside the range of their competitors' prices as those prices could best be estimated. In the district court's own words: "Plaintiffs do not claim that Exxon's wholesale prices were ... outside the range of prices charged by other major oil companies." *Allapattah Servs., Inc.* v. *Exxon Corp.*, 61 F. Supp. 2d 1308, 1322 (S.D. Fla. 1999).

[3] Even to the extent the *Shell* court's depiction of the claims in this case is accurate, the discussion only underscores the impropriety of class certification. If plaintiffs' claims focus solely on the *calculation* of dealer prices, rather than on the prices themselves, then class certification is inappropriate because it is undisputed that the calculation of prices varied widely from market to market and, hence, dealer to dealer. If Exxon were allowed to produce evidence and mount a defense on an individual basis, it would have been entitled to show that certain dealers did receive the benefit of a properly calculated price. The alleged fact that Exxon promised all dealers it would not charge twice for credit does not establish

3. The recent Eleventh Circuit opinion cited by plaintiffs confirms the true nature of the pricing claim in this case. As the court explained in *Klay* v. *Humana, Inc.*, No. 02-16333, 2004 WL 1938845 (11th Cir. Sept. 1, 2004), plaintiffs in this case alleged that Exxon breached their contracts "by overcharging them for wholesale fuel purchases." *Id.* at *20; *see id.* ("The dealers alleged that Exxon had promised them it would reduce the price of gasoline by 1.7 cents per gallon, but secretly eliminated that price reduction after a few months."). In other words, *Klay* makes clear that this dispute in this case is very much about the price Exxon charged, contrary to the understanding of this case that underlay the *Shell* court's effort to distinguish it.

More important, the *Klay* court's discussion of the class certification in this case underscores the Eleventh Circuit's misunderstanding of Rule 23's standards. According to *Klay*, class certification was proper here because "Exxon cheated all of the plaintiffs in exactly the same way – by secretly eliminating its 1.7 cent-per-gallon price reduction." *Id.*

> Once the plaintiffs proved that Exxon engaged in this behavior, *each individual plaintiff's breach of contract claim was substantially advanced.* In light of this classwide evidence, each individual dealer could demonstrate that Exxon violated his contractual rights simply by demonstrating that he had purchased gas from Exxon during the relevant time period.

Id. (emphasis added). There are two obvious problems with that analysis.

First, the legal standard applied is demonstrably wrong. Under Rule 23, a class may *not* be certified merely because

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that Exxon necessarily breached that promise to all dealers; that is a conclusion that could be reached only upon examining the price each dealer received. But because of the class certification, Exxon was denied any opportunity to show that some of the individual prices charged to various dealers did not include a double charge for the cost of credit.

each individual class members' claim would be "substantially advanced" by evidence susceptible to classwide proof. Rather, plaintiffs must prove that common issues "predominate" over all individuated issues – including all defenses to individual class members' claims – such that the individual claims are "sufficiently cohesive" that they can be litigated *en masse* without risk to the defendant's or absent class members' rights to a full and fair trial on each and every individual claim. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997).

The "predominance" standard applied by the *Klay* court confirms that this "vital prescription" of Rule 23, *Amchem*, 521 U.S. at 623, has been all but emptied of meaning in the Eleventh Circuit: "Common issues of law and fact predominate," the court announced, "if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Klay*, 2004 WL 1938845, at *8 (internal quotation marks and alterations omitted). Showing that an issue has a "direct impact" on each class member's claim, however, establishes only that the issue is common to all claims, not that it predominates over individual issues. In other words, the Eleventh Circuit's broad conception of predominance, applied in this case and in *Klay*, plainly conflates predominance with the simpler "commonality" requirement of Rule 23(a), even though "the predominance criterion is far more demanding." *Amchem*, 521 U.S. at 623-24. As the Fifth Circuit has explained – in a decision explicitly rejected by the Eleventh Circuit, *Klay*, 2004 WL 1938845, at *12 – it is error to "assume[] that because the common issues would play a part in every [individual] trial," they must predominate under Rule 23. *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). Yet that is precisely what the Eleventh Circuit assumed in this case and in *Klay*. The flaw in its approach is self-evident: to conclude that "any common issue would predominate if it were

common to all the individual trials" would simply "write the predominance requirement out of the rule." *Id.*

Second, *Klay*'s description of the substantive claims in this case – "each individual dealer could demonstrate that Exxon violated his contractual rights simply by demonstrating that he had purchased gas from Exxon during the relevant time period," 2004 WL 1938845, at *20 – only confirms that the courts below created an entirely new state-law contract claim in the course of applying Rule 23, in contravention of *Amchem* and the Rules Enabling Act. See Pet. 23-24. Although the Eleventh Circuit recognized that the dealers in this case assert a simple price-overcharge claim – *i.e.*, they paid too much because Exxon double-counted the cost of credit – plaintiffs acknowledge that not every class member was, in fact, overcharged. In light of the undisputed fact that Exxon's pricing varies significantly "from dealer to dealer, region to region, and state to state," Resp. Supp. Br. 5, plaintiffs' theory is that while some individual dealers may have been overcharged and some may have been undercharged, see, *e.g.*, Pls. C.A. Br. 73 n.27 (acknowledging "the risk of uneven impact" on dealers of alleged breach theory), the dealer class as a whole experienced an "'on average'" overcharge. Opp. 6. In an individual contract-breach case, however, the individual dealer would be required to show that he actually paid too much for gasoline. Not so under the special classwide-breach claim recognized by the courts below: as the *Klay* court put it all too candidly, every dealer was allowed to prove a contract breach simply by proving that he purchased gasoline, and Exxon *was not allowed to interpose any individuated defense to liability*, even though all agree that Exxon treated its dealers very differently in respect to pricing. Thus, far from justifying the decision in this case, *Klay* reaffirms its profound legal errors.

Finally, *Klay* further supports review for an altogether different reason: it unambiguously confirms the existence of the circuit conflict – implicated by this case as well, see Pet.

21-23 – over the propriety of class certification when the reliance of individual class members is an issue. Flatly rejecting plaintiffs' assertion here that circuit decisions on reliance and class certification differ on their facts and "do not conflict on any rule of law," Opp. 18, the Eleventh Circuit in *Klay* cited and squarely rejected the Fifth Circuit's per se rule that "'a fraud class action cannot be certified when individual reliance will be an issue.'" 2004 WL 1938845, at *12 (quoting *Castano*, 84 F.3d at 745); see Pet. 22 (citing cases applying *Castano* rule to classes asserting fraudulent concealment defenses to limitations periods). *Klay* makes clear that the circuit conflict over the propriety of class certification in the face of individually dispositive reliance issues is neither illusory nor transient. This case would be an effective vehicle for resolving that conflict.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply brief, the petition for certiorari should be granted.

Respectfully Submitted

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

September 17, 2004

(10)

No. 04-70

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EXXON CORPORATION

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

CARTER G PHILLIPS *
VIRGINIA A. SEITZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

EUGENE E. STEARNS *
STEARNS, WEAVER, MILLER, WEISSLER, ALHADEFF & SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, FL 33130

SIDNEY M. PERTNOY
JAY W. SOLOWSKY
ENGLES, PERTNOY, SOLOWSKY & ALLEN, P.A.
150 West Flagler Street
Suite 2000, Museum Tower
Miami, FL 33130

GERALD M. BOWEN
LAW OFFICES OF GERALD M. BOWEN
3174 Kirkwall Place
Oakhill, VA 20171

Counsel for Respondent

* Counsel of Record

December 6, 2004

PETITION FOR CERTIORARI FILED JULY 14, 2004
CERTIORARI GRANTED OCTOBER 12, 2004

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 04-70 Petition For A Writ Of Certiorari at the following pages:

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Allapattah Servs., Inc. v. *Exxon Corp.*, 88 F.R.D. 667 (S.D. Fla. 1999) (order certifying class) 172a-211a

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Allapattah Servs., Inc. v. *Exxon Corp.*, No. 91-0986-CIV-KEHOE (S.D. Fla. June 25, 1996) (order certifying class) 220a

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA (MIAMI)

Civil Docket For Case #: 91-CV-986

ALLAPATTAH SERVICES, et al,

v.

EXXON CORPORATION, et al,

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
5/13/91	1	COMPLAINT filed; FILING FEE $120.00 RECEIPT # 117533 A-7 STB (dt) [Entry date 05/16/91]
		• • • •
2/26/93	269	SEALED DOCUMENT placed in vault (ea) [Entry date 03/16/93] (Plaintiffs' First Amended Complaint)
		• • • •
6/21/94	338	REPORT AND RECOMMENDATIONS of Magistrate Stephen T. Brown recommending [296-1] motion to dismiss Amended Complaint for lack of subject matter jurisdiction be denied; Signature date: 6/21/94 Motion no longer referred Objections to R and R due by 7/1/94 CCAP (jh) [Entry date 06/23/94]
		• • • •

DATE	NO.	PROCEEDINGS
10/12/94	362	ORDER denying [296-1] motion to dismiss Amended Complaint for lack of subject matter jurisdiction (signed by Judge James W. Kehoe on 10/12/94) CCAP (jh) [Entry date 10/13/94]
		• • • •
2/28/97	746	MOTION by Exxon Corporation to decertify the class for counts I and III of the first amended complaint (jh) [Entry date 03/04/97]
		• • • •
5/17/99	1010	MOTION with memorandum in support by All Plaintiffs for partial summary judgment re: subject matter jurisdiction (hd)
		• • • •
6/7/99	1055	RESPONSE by Exxon Corporation in opposition to [1010-1] motion for partial summary judgment re: subject matter jurisdiction (hd) [Entry date 06/09/99]
		• • • •
6/16/99	1079	REPLY by All Plaintiffs to response to [1010-1] motion for partial summary judgment re: subject matter jurisdiction (gz) [Entry date 06/18/99]
		• • • •
7/1/99	1122	ORDER granting [1010-1] motion for partial summary judgment re: subject matter jurisdiction (Signed by Judge Alan S. Gold on 7/1/99) CCAP [EOD Date: 7/6/99] (hd) [Entry date 07/06/99]

DATE	NO.	PROCEEDINGS
		• • • •
3/30/01	1409	MOTION by Allapattah Services for entry of order on procedure for determination, and for entry of final judgment (sn) [Entry date 04/02/01]
		• • • •
5/11/01	1416	RESPONSE by Exxon Corporation in opposition to [1409-1] motion for entry of order on procedure for determination (sn) [Entry date 05/14/01]
		• • • •
5/31/01	1422	ORDER setting further argument on subject matter jurisdiction issues at oral argument for 9:00 6/7/01 (Signed by Judge Alan S. Gold on 5/31/01) CCAP [EOD Date: 6/1/01] (hd) [Entry date 06/01/01]
		• • • •
6/4/01	1424	REPLY by All Plaintiffs to response to [1409-1] motion for entry of order on procedure for determination, [1409-2] motion for entry of final judgment (hd) [Entry date 06/05/01]
		• • • •
6/8/01	1427	ORDER regarding supplemental memoranda (Signed by Judge Alan S. Gold on 6/8/01) CCAP [EOD Date: 6/8/01] (hd)
		• • • •

DATE	NO.	PROCEEDINGS
6/21/01	1432	SUPPLEMENTAL MEMORANDUM regarding judicial authority for entry of judgment in the full amount awarded by the jury by All Plaintiffs (hd) [Entry date 06/22/01]
		* * * *
6/21/01	1435	SUPPLEMENTAL MEMORANDUM regarding subject matter jurisdiction by All Plaintiffs (hd) [Entry date 06/22/01]
		* * * *
7/5/01	1438	MOTION by Exxon Corporation for leave to file exceed page limitation with regard to Memorandum in support of Motion for Judgment as a matter of law or, in the alternative, for a new trial (Proposed Memorandum located in Pod #2, Docketing) (wc) [Entry date 07/06/01]
		* * * *
7/6/01	1444	RESPONSE by Exxon Corporation in opposition to [1435-1] supplemental memorandum regarding subject matter jurisdiction (hd) [Entry date 07/09/01]
7/6/01	1445	MEMORANDUM in response by Exxon Corporation to [1432-1] supplemental memorandum regarding entry of judgment (hd) [Entry date 07/09/01]
		* * * *
7/13/01	1451	REPLY by All Plaintiffs in support of [1435-1] supplemental memorandum regarding subject matter jurisdiction (hd) [Entry date 07/16/01]

DATE	NO.	PROCEEDINGS
7/13/01	1452	REPLY by All Plaintiffs in support of [1432-1] supplemental memorandum regarding judicial authority for entry of judgment in the full amount awarded by the jury (hd) [Entry date 07/16/01]
		* * * *
8/7/01	1464	ORDER on procedure for determination and entry of final judgment, granting in part, denying in part [1409-1] motion for entry of order on procedure for determination, granting in part, denying in part [1409-2] motion for entry of final judgment (Signed by Judge Alan S. Gold on 8/7/01) [EOD Date: 8/8/01] (hd) [Entry date 08/08/01]
		* * * *
8/29/01	1468	NOTICE OF FILING SUPPLEMENTAL AUTHORITY by All Plaintiffs regarding subject matter jurisdiction re: [1435-1] support memorandum (sn) [Entry date 08/30/01]
		* * * *
10/2/01	1509	ORDER from United States Court of Appeals 11th Circuit GRANTING petition for permission to appeal as to Allapattah Services, Incorporated (on 10/02/01) [EOD Date: 11/1/01] (ga) [Entry date 11/01/01]
10/2/01	1510	ORDER from United States Court of Appeals 11th Circuit GRANTING petition for permission to appeal as to Exxon Corporation (on 10/02/01) [EOD Date: 11/1/01] (ga) [Entry date 11/01/01]
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

01-15575-AA

ALLAPATTAH SERVICES, INCORPORATED, a Florida corporation, ROBERT LEWIS, INC., a Florida corporation, d.b.a. Trial Exxon, G.G.S.K.1, INC., a Florida corporation, d.b.a. North Stuart Exxon, G.G.S.K., Inc., JOHN PINDER, LEE-LANGLEY CORP., MARTIN I. COOK, DAVID WISE, WILLSTON CENTER AUTOCARE, INCORPORATED, RYLYNS ENTERPRISES, INCORPORATED, a Virginia corporation on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees
Cross-Appellants,

ROY PAGE, GLEBE ROAD EXXON, INCORPORATED,
Plaintiffs,

versus

EXXON CORPORATION, a New Jersey corporation,
Defendant-Appellant
Cross-Appellee.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * *
03/06/2002	Appellant's Brief Filed: Appellant-Exxon Corporation, (Atty: Robert J. Brookshiser, Jr.)

DATE	PROCEEDINGS
	* * * *
04/16/2002	Appellee/Cross-Appellant Brief: (hand-dlvrd) Appellee-Allapattah Services, Inc., et al. (Atty: Eugene E. Stearns)
	* * * *
05/23/2002	Cross-Appellee/Appellant Reply Brief: Appellant-Exxon Corporation, (Atty: John F. Stanton)
	* * * *
06/18/2002	Reply Brief Filed: Appellee-Allapattah Services, Inc., (Atty: Eugene E. Stearns)
	* * * *
06/11/2003	OPIN1A (Opinion-Issuance with Costs) issued. each party bears their own costs on appeal. cc: Cecchi, James E.
06/11/2003	OPIN1A (Opinion-Issuance with Costs) issued. each party bears their own costs on appeal. cc: Stewart, Larry S. cc: Abrams, Robert G. cc: Brookshiser, Robert J., Jr. cc: Ganzfried, Jerrold J. cc: Stanton, John F. cc: Stearns, Eugene E. cc: Solowsky, Jay
06/11/2003	Opinion Issued 01-15576x. Consol. w/& also filed in 01-16244.
06/11/2003	Judgment Entered
	* * * *
07/02/2003	Petition for Rehearing En Banc: (Atty: John F. Stanton)
07/02/2003	Petition for Rehearing En Banc: (Atty: Eugene E. Stearns)

DATE	PROCEEDINGS
	* * * *
03/15/2004	The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, the Pet. for Rehearing En Banc is DENIED. (PUBLISH) GBT Dissenting.
	* * * *
07/20/2004	Notice of Filing Certiorari: sc# 04-70
10/12/2004	Checked website, cert granted, limited to question #1 presented by the petition. 90 minutes allotted for oral argument. Didn't give argument date.

SUPREME COURT OF THE UNITED STATES

No. 04-70

EXXON CORPORATION,
Petitioner

v.

ALLAPATTAH SERVICES, INC., et al.

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit, No. 01-15575, 01-16244.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Eleventh Circuit.

IT IS ORDERED by this Court that the said petition is granted limited to Question one presented by the petition and is consolidated with No. 04-79. A total of 90 minutes is allotted for oral argument.

October 12, 2004

A true copy WILLIAM K. SUTTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy

(6)

Supreme Court, U.S.
FILED
DEC 6 - 2004
OFFICE OF THE CLERK

No. 04-70

IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER EXXON CORPORATION

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT G. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

December 6, 2004

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts with diversity jurisdiction over the individual claims of named plaintiffs to exercise supplemental jurisdiction over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement of 28 U.S.C. § 1332?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following parties are respondents in this proceeding:

Paul Bove
Martin I. Cook
George Dalton
Richard P. Durishin
Alberto Gonzalez
G.G.S.K., Inc., d/b/a Trail Exxon
G.G.S.K. 1 d/b/a Northlake Exxon
Lee-Langley Corporation
Robert Lewis, Inc. d/b/a North Stuart Exxon
R. William McGillicuddy
John Pinder
Rylans Enterprises
Williston Center Autocare, Inc.
David Wise

and all similarly situated persons.

Exxon Corporation is now known as Exxon Mobil Corporation. There is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in Exxon Mobil Corporation.

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The panel opinion of the court of appeals is reported at 333 F.3d 1248 (App. 67a-92a). The order of the court of appeals denying the petition for rehearing en banc, accompanied by the dissenting opinion of Judges Tjoflat and Birch, is reported at 362 F.3d 739 (App. 1a-66a). The district court's order and opinion entering final judgment for the class representatives only, denying the motion to enter final judgment for the class, and certifying the case for interlocutory review is reported at 157 F. Supp. 2d 1291 (App. 95a-156a).

STATUTE AND RULE INVOLVED

28 U.S.C. § 1367 and Federal Rule of Civil Procedure 23 are reproduced at App. 246a-254a. 28 U.S.C. § 1332 provides in pertinent part:

> Diversity of citizenship; amount in controversy; costs
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States. . . .

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 11, 2003. App. 68a. Petitioner Exxon Corporation ("Exxon") timely filed a petition for rehearing and rehearing en banc, which was denied on March 15, 2004. App. 2a. Petitioner filed a motion for extension of time with Justice Anthony M. Kennedy on May 10, 2004. Justice Kennedy granted petitioner an extension of time up to and including July 14, 2004, to file a petition for certiorari. This Court granted the petition for certiorari on October 12, 2004, Joint Appendix

("JA") 8, 9. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

The question presented is whether in a class action, federal courts with diversity jurisdiction over the claims of named class representatives also have supplemental jurisdiction, see 28 U.S.C. § 1367, over the claims of unnamed class members who fail to comply with the minimum-amount requirement of 28 U.S.C. § 1332.[1] Construing § 1332, this Court long ago held that federal courts with diversity jurisdiction do not have either original or supplemental jurisdiction over such noncompliant class members. See *Zahn* v. *International Paper Co.*, 414 U.S. 291, 301 (1973). In enacting 28 U.S.C. § 1367, Congress authorized federal courts that "have original jurisdiction" to exercise supplemental jurisdiction over other claims that are part of the same case or controversy. But, a federal court does not "have original jurisdiction" over a class action when the class includes unnamed members who do not meet the minimum-amount requirement, see, *e.g.*, *Zahn*, 414 U.S. at 301; *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267, 267-68 (1806), *overruled in part on other grounds by Louisville, Cincinnati, & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844). Thus, the text of § 1367 makes clear that a federal court cannot exercise supplemental jurisdiction in such a case.

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[1] Section 1332 authorizes federal courts to exercise diversity jurisdiction only if (a) the "matter in controversy" exceeds a specified sum, and (b) there is complete diversity of citizenship between the named plaintiffs and defendants. 28 U.S.C. § 1332. This case involves the first of these requirements which, throughout this brief, is referred to as the "minimum-amount requirement," the "amount-in-controversy requirement" or the "jurisdictional-amount requirement." Cases sometimes refer to this requirement as the "matter-in-controversy rule." *See, e.g., Zahn* v. *International Paper Co.*, 414 U.S. 291, 301 (1973).

This problem cannot be solved by pretending that a diversity class action is nothing more than an action filed by named plaintiffs who satisfy the minimum-amount requirement, followed by the addition of unnamed plaintiffs who do not. Class certification is not the equivalent of the mass joinder or intervention of plaintiffs; indeed, Federal Rule of Civil Procedure 23(a) specifies that class certification is appropriate only when the "joinder of all plaintiffs is impracticable." Section 1367 does not address, let alone authorize, supplemental jurisdiction in class actions. In any event, in diversity cases, the addition of a noncompliant plaintiff *destroys* the court's original diversity jurisdiction. Section 1367 cannot logically be interpreted to provide that the addition of a party simultaneously authorizes supplemental jurisdiction *and* eliminates the original diversity jurisdiction on which that supplemental jurisdiction must be based. And even assuming that there is some remaining ambiguity in the text, the legislative history conclusively demonstrates that in enacting § 1367, Congress intended to preserve *Zahn*. The House Report, which was adopted in full by the Senate, expressly states that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions," and then cites to *Zahn*. H.R. Rep. No. 101-734, at 28-29 & n.17 (1990) ("House Report").

The court below incorrectly assumed that § 1367(a) authorizes diversity courts to exercise supplemental jurisdiction over unnamed class members whose claims do not satisfy § 1332. It then found significant that § 1367(b) prohibits the exercise of supplemental jurisdiction over parties who join or intervene in an action under Federal Rules of Civil Procedure 19 and 24, but does not mention Rules 23 and 20. Dispositively, as noted, § 1367(a) does *not* authorize diversity courts to exercise supplemental jurisdiction over noncompliant class members or parties whose presence would destroy the court's original diversity jurisdiction, thus there was no need to mention Rules 23 and 20 in § 1367(b). In

addition, on the lower court's interpretation of § 1367(b), Congress forbid diversity courts to exercise supplemental jurisdiction over actions in which noncompliant plaintiffs were (a) initially named in the complaint or (b) joined or intervened pursuant to Rules 19 and 24, but authorized diversity courts to exercise supplemental jurisdiction when a class including noncompliant plaintiffs is certified or when noncompliant plaintiffs are added after the complaint is filed under Rules 20 and 23. This unlikely construction would effectively overrule *Zahn* and *Strawbridge*, as well as the descendants of *Strawbridge*, despite Congress's explicit contrary intention. The fundamental flaw in this statutory interpretation is reflected in the absurdity of the consequences it generates.

Only petitioner's interpretation, moreover, comports with established principles of statutory interpretation. This Court has pointed to Congress's consistent choice to cut back on the federal courts' diversity jurisdiction and Congress's settled acceptance of this Court's interpretation of § 1332, and thus required an "express statement" of Congress's intent to alter and expand § 1332. See *Zahn*, 414 U.S. at 302. And, the Court's respect for state sovereignty and congressional supremacy already requires a narrow construction of any federal statute delineating the federal courts' diversity jurisdiction. Add to these principles of construction a suitable reluctance to assume that Congress silently overruled *Zahn*, *Strawbridge* and other settled precedent of this Court, and it is evident that § 1367 should be narrowly construed to preserve these decisions and to implement the express will of Congress. The court below did not have jurisdiction over this action.

In these circumstances, the judgment below should be vacated. The courts below never had jurisdiction over this action. The entire course of the litigation was infected by the unlawfully-defined class, and the judgment itself was

predicated on the unlawful class definition and on proof that was itself based on the unlawful class definition.

STATEMENT OF THE CASE

1. Plaintiffs here represent a class of approximately 10,000 current and former Exxon motor fuel dealers. They alleged that in 1982 Exxon initiated a marketing program known as the Discount for Cash ("DFC") program and that in administering that program, Exxon overcharged them for wholesale motor fuel purchases between March 1, 1983 and August 31, 1994. Plaintiffs asserted that these overcharges constituted breaches of Exxon's agreements with its dealers. App. 69a.

Each Exxon dealer operates under a separate contract (called a "Sales Agreement") with Exxon. App. 69a, 223a. Each Sales Agreement contains an open-price term, under which the individual dealer is obligated to pay Exxon's "established dealer price" at the time of delivery. Sales Agreement, art. 4; App. 88a & n.16. There is no national dealer price; instead, Exxon establishes the wholesale price for individual dealer sales by continually evaluating market conditions to estimate the wholesale prices charged by Exxon's competitors in each local market. As a result, dealer prices vary from market to market; and, because they are estimates, they can be below, at, or above the "true" wholesale market price for any given dealer at any given time.

The DFC program was established to encourage Exxon dealers to implement a price structure that would, in turn, encourage retail customers to use cash rather than a credit card to pay for motor fuel, by charging customers using cash a few cents less than customers using credit cards. App. 69a. Under the DFC program, Exxon changed its pricing system so that dealer prices were set in each market by reference to the local wholesale "cash" price (rather than the credit price),

charged dealers a 3% processing fee on all credit card sales, and urged (but did not require) dealers to establish a two-tiered retail price structure, offering a discount to customers paying cash. *Id.*

2. In May 1991, the dealers filed a class action against Exxon in federal district court; the stated basis for federal court jurisdiction was diversity of citizenship under 28 U.S.C. § 1332. The dealer class alleged that the DFC program obligated Exxon to offset the mandated credit card fees by reducing wholesale gasoline prices "on average" for the class "as a whole." The class alleged that this contractual obligation was imposed under the dealers' individual Sales Agreements. The class further asserted that under the DFC program, Exxon reduced the wholesale price by 1.7 cents per gallon for six months, but stopped providing this reduction in March 1983 without informing its dealers. The dealers claimed that by ceasing to reduce wholesale prices to offset the 3% credit card fee, Exxon breached its contractual obligation to the class as a collectivity and, "on average," overcharged the dealers for gasoline during the class period. App. 109a-110a, 161a.

Plaintiffs sought class certification. Exxon opposed the motion on the grounds that the varying circumstances of each dealer's sales – including regional variations in market and pricing conditions – as well as individual dealer reliance on alleged representations, individual damages determinations, and the existence of individualized affirmative defenses, made certification impermissible under Rule 23(b)(3). The magistrate judge rejected Exxon's arguments, App. 235a, and recommended certification of a class of all dealers who were party to a Sales Agreement at any time during the DFC program, *id.* at 238a. The district court affirmed. *Id.* at 220a.

Exxon also asserted that the court lacked jurisdiction over class members who did not satisfy the requirements of § 1332. The district court rejected this argument and held that

it had jurisdiction over all class members under § 1367. App. 212a-214a.

After certification, the case was tried to a hung jury in September 1999. It was retried in January 2001, resulting in a jury verdict in favor of the dealer class. The jury found that Exxon had a contractual obligation to reduce prices "on average" to the class as a whole. App. 161a, 162a.

The district court denied Exxon's post-trial motions seeking to overturn the verdict, and awarded pre-judgment interest and compensatory damages. App. 155a-156a. The court later entered final judgment under Rule 54(b) *for the named class representatives* based on a computation of the "on average" damage figure. *Id.* at 93a-94a. The court denied, however, the dealers' motion for entry of a final judgment with respect to the class. The court concluded that it could not enter an aggregate damages award because the jury had not awarded aggregate damages, and therefore that final judgment could be entered only for the class representatives. *Id.* at 155a. The court established an ad hoc claims process through which Exxon could contest individual class members' claims for compensatory damages. *Id.*

The court also certified the case for interlocutory review under 28 U.S.C. § 1292(b), asking the court of appeals to resolve the following substantial questions: "(1) whether [the court] properly exercised supplemental jurisdiction over class members whose claims did not meet the jurisdictional minimum amount in controversy requirement; and (2) whether an aggregate compensatory and prejudgment interest award could be entered for the class before the claims administration process." App. 68a.

3. The Eleventh Circuit affirmed the district court order. First, it addressed whether the district court had supplemental jurisdiction over the claims of class members who failed to meet the minimum amount-in-controversy requirement of § 1332(a). Relying on what it characterized as the plain

language of the supplemental jurisdiction statute, the court held that § 1367 authorizes a district court entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional minimum amount-in-controversy requirement. App. 72a-74a.

The court next affirmed the district court's refusal to enter an aggregate judgment for the dealers based on the jury verdict. App. 79a. The court acknowledged that "the determination of the amount that each dealer was overcharged during the class period must take place on an individual basis, taking into account the amount of compensatory damages to which each dealer is entitled." *Id.* at 78a. In light of the determinations to be made in the individual claims process, moreover, the court affirmed Exxon's right to participate in the claims process and to raise its claims of entitlement to set-offs. *Id.* at 80a, 83a.

Finally, the court affirmed the certification of the class under Rule 23(b)(3). The court rejected Exxon's arguments that "there were individual issues inherent in each dealer's breach of contract claim and its own affirmative defenses." App. 85a. The court held that because the dealer agreements were "materially similar and Exxon purported to reduce the price of wholesale gas for all dealers," its "duty of good faith was an obligation that it owed to the dealers as a whole." *Id.* Moreover, while the court recognized that there were numerous individualized damages issues that potentially required 10,000 hearings to resolve, the court held that "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Id.* at 86a.

4. Exxon filed a petition for rehearing and rehearing en banc, which the Court denied. Judge Tjoflat, joined by Judge Birch, dissented from the denial of rehearing on the question whether the district court, with jurisdiction under § 1332, had the power to exercise supplemental jurisdiction over unnamed

class members who failed to meet the amount-in-controversy requirement for federal diversity jurisdiction.

SUMMARY OF ARGUMENT

The decision below ignores the best reading of the statutory text, the conclusive legislative history, and numerous principles of statutory construction. Section 1367(a) authorizes a federal district court to exercise supplemental jurisdiction only if it "ha[s] original jurisdiction." This Court has already held, in interpreting § 1332, that a federal court sitting in diversity does not "have original jurisdiction" over a class action where unnamed members of the class fail to satisfy the amount-in-controversy requirement. See *Zahn*, 414 U.S. at 301. The prerequisite for the exercise of supplemental jurisdiction, accordingly, is missing here.

But, the lower courts opined, the district court could assume that named plaintiffs had filed an action that complied with § 1332 and then added plaintiffs with noncompliant claims. In the Eleventh Circuit's view, in these circumstances, § 1367(a) would authorize supplemental jurisdiction over the added plaintiffs. This is wrong for several reasons.

First, certification of a class is not the equivalent of the massive joinder or intervention of plaintiffs; instead, a class action is a representative action. What this means is that unnamed parties do *not* join or intervene in a class action; indeed, Federal Rule of Civil Procedure 23(a) states that class certification is appropriate only when "joinder of all members is impracticable." Nothing in § 1367(a) authorizes a court with diversity jurisdiction over named plaintiffs to exercise supplemental jurisdiction over a *class* (as opposed to plaintiffs who actually join or intervene in a case).

Second, a court that "ha[s] original jurisdiction" under § 1332 *loses* original jurisdiction at the moment a party who does not satisfy the minimum-amount requirement is added to

the case. It makes little sense to read § 1367(a) to provide that the same act – class certification – simultaneously effectuates supplemental jurisdiction and destroys the original jurisdiction that is the basis for supplemental jurisdiction. This point is effectively illustrated by contrasting federal-question and diversity jurisdiction. Federal-question jurisdiction is not affected by the addition of parties or claims over which the court *lacks* original jurisdiction; the court's power persists. In contrast, a court's diversity jurisdiction is *destroyed* by the addition or joinder of noncompliant plaintiffs, and those plaintiffs must be dismissed. Thus, § 1367(a) authorizes a court with original, federal-question jurisdiction to exercise supplemental jurisdiction over all related claims and a court with diversity jurisdiction to exercise supplemental jurisdiction over all related claims that are consistent with § 1332. But, § 1367(a) cannot be read to authorize a court with diversity jurisdiction to exercise supplemental jurisdiction over parties whose presence eliminates original jurisdiction.

This logical reading of the statutory text has the substantial, additional virtue of comporting with congressional intent, as expressed both explicitly and implicitly. The House Report, which was adopted in full by the Senate, expressly states that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley* [v. *United States*, 490 U.S. 545 (1989)]," and then *cites* this Court's decision in *Zahn*. House Report at 28-29 & n.17. Fearing that *Finley* might be broadly interpreted to prohibit *all* supplemental jurisdiction not expressly authorized by statute and knowing that *Finley* prohibited pendent-party jurisdiction even in federal-question cases, Congress enacted § 1367 to provide the necessary statutory authorization for supplemental jurisdiction and to make clear that pendent-party jurisdiction is permitted in federal-question cases – *viz.*,

to overrule *Finley*. Congress preserved this Court's established interpretation of § 1332.

Further evidence of § 1367's intended scope is found in § 1367(b). There Congress prohibitied the exercise of supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rules 14, 19, 20, or 24," and "over claims by persons proposed to be joined as plaintiffs under Rule 19 . . . or seeking to intervene as plaintiffs under Rule 24" whenever exercising supplemental jurisdiction "would be inconsistent with the jurisdictional requirements of section 1332." 28 U.S.C. § 1367(b). Congress sought simultaneously to authorize supplemental jurisdiction, and to prevent the circumvention of § 1332.

On the Eleventh Circuit's view of § 1367(b), however, Congress authorized a court with diversity jurisdiction to exercise supplemental jurisdiction over noncompliant plaintiffs added to an action pursuant to Rules 23 and 20, but not Rules 19 and 24. So read, § 1367 effectively overrules not only *Zahn*, but also *Strawbridge* and its numerous progeny (in the teeth of legislative history stating that such was *not* Congress's intent). This reading is therefore astonishing and unlikely, particularly in light of the fact that the liberal, inclusive joinder standard in Rule 20 means that it could be used to add the same plaintiffs whose joinder in the complaint or under Rules 19 and 24 would be forbidden. In contrast, petitioner's reading of § 1367 preserves § 1332 by reading § 1367(a) to authorize supplemental jurisdiction only when the court "ha[s] original jurisdiction" over the complaint, and by reading § 1367(b) to forbid supplemental jurisdiction over noncompliant plaintiffs added by other mechanisms. "'[T]here is no canon against using common sense in construing laws as saying what they obviously mean.'" *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, No. 03-377, slip op. at 12 (U.S. Nov. 30, 2004) (alteration in original).

Finally, numerous common-sense principles of statutory interpretation militate strongly in favor of petitioner's analysis. For decades, Congress has repeatedly limited the federal courts' diversity jurisdiction and approved this Court's narrow constructions of § 1332. Congress's actions and the longevity of this Court's settled interpretations of § 1332 have led this Court to require "some express statement of [Congress's] intention" before it will find those settled interpretations overruled. *Zahn*, 414 U.S. at 302. Section 1367 contains no such statement; indeed, its text and history require the contrary conclusion.

Moreover, the federal courts' respect for state sovereignty (as reflected in the exclusive power of state courts definitively to construe state law) and for Congress's supremacy in defining federal-court jurisdiction has given rise to a general rule of narrow construction of statutes delineating federal-court jurisdiction. See *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969); *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Both concerns – founded in our federalism – support petitioner's limiting construction of § 1367, while the Eleventh Circuit's interpretation would result in the litigation of virtually all diversity-based class actions in federal court, in contravention of Congress's express intent.

One final defect in the interpretation of § 1367 adopted by the courts below is, as noted *supra*, that it entails that Congress *sub silentio* overruled *Zahn*, *Strawbridge*, and numerous other cases interpreting § 1332. Lower courts and, indeed, this Court should be reluctant to presume that Congress has legislatively reversed a ruling of this Court – and most certainly should not do so when Congress has *approved* that decision. *Zahn* remains the law, and § 1367 does not authorize courts with diversity jurisdiction to exercise supplemental jurisdiction over a class including unnamed plaintiffs whose claims do not satisfy the minimum-amount requirement of § 1332.

The courts below lacked any power to decide this case, and the judgment is, accordingly, void. As a result of the erroneous assertion of subject-matter jurisdiction, this case was litigated on behalf of a class over which the court lacked jurisdiction, and liability and damages were determined and calculated based *solely* on expert testimony wrongly using aggregated data derived from *all Exxon dealers*. The wrongful certification infected the litigation and tactics in this case in numerous ways, altering the settlement calculus and allowing plaintiffs to prove their case using national, aggregated data that might not have been adequate to prove liability and damages for a smaller subset of dealers. Accordingly, the judgment below must be vacated in its entirety.

ARGUMENT

I. FEDERAL COURTS EXERCISING DIVERSITY JURISDICTION MAY NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER UNNAMED PLAINTIFFS IN CLASS ACTIONS WHOSE CLAIMS DO NOT SATISFY § 1332'S AMOUNT-IN-CONTROVERSY REQUIREMENT.

The Eleventh Circuit held that § 1367 authorizes federal district courts exercising diversity jurisdiction to assert supplemental jurisdiction over unnamed plaintiffs in class actions whose claims fail to satisfy § 1332's amount-in-controversy requirement. Put differently, the court concluded that § 1367 legislatively overruled this Court's decision in *Zahn*, which had held that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount." 414 U.S. at 301. The decision below is wrong because it contravenes the text and structure of § 1367, established interpretive principles governing jurisdictional statutes, and express congressional intent and purpose.

A. The Text And Structure Of § 1367 Do Not Authorize Supplemental Jurisdiction In This Setting.

1. The court below relied on the "plain language" of § 1367 in concluding that district courts with diversity jurisdiction may exercise supplemental jurisdiction over unnamed class members whose claims do not satisfy the amount-in-controversy requirement. App. 74a. According to the court, the plain language of a statute that never once refers to class actions fundamentally altered a decades-old rule regarding the propriety of their adjudication in federal court. In fact, the language of the statute holds no such "plain meaning," and its better reading precludes the exercise of supplemental jurisdiction in this case. The court of appeals simply did not read carefully enough.

Section 1367 codifies, with changes, the doctrines of pendent-claim, pendent-party and ancillary jurisdiction.[2] In pertinent part, § 1367(a) provides that:

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[2] The contours of these doctrines were not entirely clear, but certain general observations can be made that illuminate the origins of § 1367. Cases involving a federal-question claim joined with a related state-law claim against the same defendant implicate pendent-claim jurisdiction. *See United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 725-27 (1966). Pendent-claim jurisdiction was not applied in diversity cases because when the source of the court's original jurisdiction is § 1332, additional claims against the same defendant necessarily fulfill § 1332's requirements.

Pendant-party jurisdiction is implicated when a plaintiff seeks to add a state-law claim that involves the joinder of additional parties to its civil action based on federal-question or diversity jurisdiction. Prior to the enactment of § 1367, this Court had twice refused to apply pendant-party jurisdiction in federal-question cases on the facts presented. *See Aldinger* v. *Howard*, 427 U.S. 1, 6-19 (1976); *Finley* v. *United States*, 490 U.S. 545, 546-47, 556 (1989). Section 1367 reversed *Finley*, making clear that pendent-party jurisdiction is now permitted in federal-question cases. Pendent-party jurisdiction was not applied in cases arising in diversity jurisdiction, because it was precluded by the requirements of § 1332. *See* James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. Pa. L. Rev. 109, 129 (1999).

Ancillary jurisdiction was applied to related claims asserted in a federal civil action (whether by plaintiffs, defendants, or intervenors of right) "after the filing of the original complaint." Paul M. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1685 n.1 (3d ed. 1988). In certain circumstances, it allowed the addition of parties as well as claims. *See Owens Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374-77 (1978) (ancillary jurisdiction "typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court"). Prior to § 1367, ancillary jurisdiction was applied in diversity actions only when it was deemed consistent with the requirements of § 1332. *Id.*

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

No federal question is presented in this case; the district court was exercising diversity jurisdiction under 28 U.S.C. § 1332. Accordingly, the first interpretive question is whether plaintiffs filed a "'civil action of which the district courts of the United States have original jurisdiction.'" See, *e.g.*, *City of Chi.* v. *International Coll. of Surgeons*, 522 U.S. 156, 166 (1997) (citation omitted).

In decisions dating to the early nineteenth century, this Court has consistently held that in diversity cases, the federal courts have original jurisdiction only where plaintiffs' claims satisfy § 1332's minimum-amount requirement. See *Strawbridge*, 7 U.S. (3 Cranch) at 267-68; *Clark* v. *Paul*

Gray, Inc., 306 U.S. 583, 589 (1939); *Pinel* v. *Pinel*, 240 U.S. 594, 596 (1916); *Troy Bank* v. *G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911). This requirement applies with full force in the class-action setting. See *Snyder*, 394 U.S. at 336; *Zahn*, 414 U.S. at 294 ("'[w]hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount'").[3]

Indeed, even the dissenters in *Zahn* agreed that the district court did not have *original* jurisdiction over unnamed class members whose claims did not satisfy the minimum-amount requirement. See 414 U.S. at 302-12 (Brennan, J., dissenting) (asserting that the district court had "ancillary jurisdiction" over the claims of unnamed class members that do not satisfy the minimum-amount requirement). It is, accordingly, clear that the federal district court did not have *original* jurisdiction over plaintiffs' class action, because the claims of unnamed class members did not satisfy the minimum-amount requirement.

The courts below found jurisdiction only by ignoring that this case was filed as a class action. In their view, a district court should pretend that the named plaintiffs who satisfy the minimum-amount requirement have filed a civil action on their own behalf – an action over which the court would have had original diversity jurisdiction. App. 75a. Then, the court should treat the unnamed class members whose claims do not

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[3] In *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921), *overruled in part on other grounds by Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118 (1941), the Court decided that a federal court has subject-matter jurisdiction in a diversity case even if some unnamed class members share the defendant's citizenship so long as there is complete diversity between the class representatives and the defendant. *Id.* at 359. But, the Court has never deviated from its view that under § 1332, each plaintiff's claim is a "matter in controversy" that must satisfy the minimum-amount requirement of the statute.

satisfy the minimum-amount requirement as if they were joined in the action. *Id.* On this view, § 1367 authorizes the court to exercise supplemental jurisdiction over those joined plaintiffs.

This interpretation of § 1367(a) is plainly wrong for two, independent reasons. First, nothing in either § 1367(a) or Rule 23 (which provides the standards for class certification) suggests that a class action can be treated as a two-step process of individual lawsuit and massive joinder. No such contrived process can be squared with the unique inquiry required under Rule 23. Second, this broad reading of § 1367(a) is wrong because a federal court's original diversity jurisdiction over a civil action is destroyed – and thus cannot form the foundation for supplemental jurisdiction – when parties whose claims do not satisfy § 1332 are joined.

(a) The Eleventh Circuit's reading of § 1367 reflects a fundamental misunderstanding of the nature of class actions. The court seeks to treat class certification as if it is identical to the joinder or intervention of additional plaintiffs. This is wrong. Both the process and the consequences of class certification demonstrate that it is fundamentally different from joinder and intervention and that § 1367 does not authorize supplemental jurisdiction over unnamed class members whose claims do not satisfy § 1332.

Unlike other civil actions, a class action lawsuit begins with the filing of a complaint that includes class allegations. Such a complaint is governed by Rule 23, and is treated as a class action unless and until the court declines to certify. See Fed. R. Civ. P. 23 advisory committee's note on 1966 amendment subdivision (c)(1). The filing of the class-action complaint has an immediate legal effect on all putative class members, not just the named plaintiffs. The statute of limitations is tolled, see *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 547-49 (1974); and class counsel owes fiduciary duties to all putative class members, even before the class is certified, see *In re General Motors Corp. Pick-Up Truck Fuel*

Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995). From the outset, accordingly, a class action is fundamentally different from an individual action subject to joinder by absent parties at some point in the future.

What distinguishes the class action device is its potential to bind individuals to a litigated result even though those individuals take no part in the litigation. As this Court observed long ago, a class action is a "representative suit," litigated by class representatives on behalf of all. *Hansberry* v. *Lee*, 311 U.S. 32 (1940):

> To the[] general rule[] [that a person is not bound by a judgment in litigation in which he is not a party] there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. [*Id.* at 40 (citing *Smith* v. *Swormstedt*, 57 (16 How.) U.S. 288 (1853).]

See also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 847 (1999) (in a class action, the "legal rights of absent class members . . . are resolved regardless of either their consent, or . . . their express wish to the contrary"); *id.* at 846 (recognizing "[t]he inherent tension between representative suits and the day-in-court ideal"). Specifically, unnamed parties are bound by the results if the class action is mandatory (*i.e.*, if no person may opt out of the class), as in Rule 23(b)(2) classes seeking injunctive relief. Unnamed class members are also bound if they fail to opt out of a class that is not mandatory, as in Rule 23(b)(3) classes seeking monetary relief. See *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994) (per curiam); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

Because a class action is a representative suit, it can proceed only if the class is sufficiently cohesive to permit

absent class members to be bound to the result of litigation in which they do not participate. See *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997); *Ortiz*, 527 U.S. at 846-47. Thus, Federal Rule of Civil Procedure 23 imposes a number of prerequisites for class certification through which the court assesses the cohesiveness of the class and the adequacy of the class representative.[4] This process and its substantive standards distinguish class action from other types of multi-party actions.

Critically, unnamed class members do not "join" or "interven[e]" in a class action within the meaning of § 1367(a). Indeed, by definition and federal rule, a class may not be certified unless "joinder of all members is impracticable," Fed. R. Civ. P. 23(a), making clear that unnamed class members cannot be characterized as having joined or intervened in an extant civil action simply because a class has been certified. Rule 23 itself thus makes clear that a class action complaint cannot be re-packaged as an individual complaint to which additional parties are later joined.[5] If joinder were feasible, there would be no class action.[6]

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[4] Rule 23 sets forth detailed requirements for certification. Under Rule 23(a), the inquiry for class certification addresses numerosity, common issues of law and fact, the typicality of the class representatives' claims, and the adequacy of the representation. Under Rule 23(b), the court must also impose different, additional requirements for the so-called limited fund classes of Rule 23(b)(1)(B), injunctive relief classes under (b)(2), and money damages classes under (b)(3). And, in contrast to the most other interlocutory appeal rules, Rule 23 certification is subject to a unique appeals process to ensure that proceeding as a class is justified. See Rule 23(f).

[5] The standards for certifying a class are fundamentally different from the standards for determining whether individual parties and their claims can or must be joined or added under Rules 14, 19, 20, and 24. Rule 14 authorizes a defendant to implead a third-party defendant if such defendant "is or may be liable" for some portion of plaintiff's claim against the original defendant, and further provides that the plaintiff may

The fundamental differences between a class action and joinder and intervention make Congress's failure to mention supplemental jurisdiction over unnamed class members in § 1367(a) notable. In this setting, that omission in combination with the last sentence of § 1367(a) – explaining that supplemental jurisdiction embraces "claims that involve the joinder or intervention of additional parties" – makes clear that § 1367 does *not* contemplate the use of the class-certification mechanism to obtain supplemental jurisdiction over unnamed class members whose claims do not satisfy the minimum-amount requirement.

Simply put a class action is a fundamentally different kind of aggregation – it is a representative action that binds unnamed class members to litigation through neither joinder nor intervention. Section 1367(a) simply does not speak to such representative actions and certainly should not be read to apply to the fundamentally different type of expanded judicial power embodied in a class action.[7]

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assert any claim against the third-party defendant arising out of the same transaction or occurrence that is the subject matter of the plaintiff's original claim. Rule 19 authorizes the joinder of parties essential for the just adjudication of a civil action. Rule 20 authorizes the joinder of plaintiffs or defendants in a single action that involves claims arising out of the same transaction or occurrence "if any question of law or fact common to all these persons will arise." Rule 24 authorizes intervention of right and permissive intervention by putative plaintiffs and defendants.

[6] *See also Devlin* v. *Scardelletti*, 536 U.S. 1, 9-10 (2002) (explaining that class certification has different consequences than intervention or joinder and that the rights and responsibilities of unnamed class members are a function of the procedural and substantive context).

[7] Even on plaintiffs' interpretation of § 1367(a), the decision below should be vacated. It is conceded here that the court could acquire "original jurisdiction" within the meaning of § 1367(a) *only* by declining to certify the class for which plaintiffs sought certification. This is because a federal court does not have *original* jurisdiction over a class or representative action in which unnamed class members do not satisfy the

(b) The lower courts' reading of § 1367(a) is wrong for a second, independent reason. Even if class litigation could be treated as an individual action followed by "joinder" of additional parties, § 1367(a) authorizes federal courts to exercise supplemental jurisdiction if, and only if, they already have "original jurisdiction" over the "civil action." In cases based on diversity jurisdiction, federal courts *have original jurisdiction over a civil action* only when the parties are completely diverse and when the plaintiffs' claims meet the minimum-amount requirement in § 1332. See *Wisconsin Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 387 (1998). In diversity-based class actions, complete diversity with all unnamed class members is not required, see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 359 (1921), *overruled in part on other grounds by Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118 (1941); but a federal court has original jurisdiction over the action only if all class members satisfy the minimum-amount requirement, see *Zahn*, 414 U.S. at 296. In diversity actions, original jurisdiction exists in federal courts if the noncompliant party is dismissed, but such jurisdiction is absent while the noncompliant party remains in the case. It simply makes no sense to read § 1367(a) – which authorizes federal courts to exercise supplemental jurisdiction only when they already have *original* jurisdiction – to

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minimum-amount requirement, *see Zahn*, 414 U.S. at 293-95; *id.* at 304 (Brennan, J., dissenting). To obtain *original* jurisdiction, the court was required either to alter the class definition to exclude members who did not satisfy the requirement or to deny certification to the class (as was done in *Zahn*). Once a court obtains "original jurisdiction" over a diversity action by dismissing from the suit all parties named and unnamed who do not satisfy the minimum-amount requirement, what remains is either (a) a class from which, by definition, noncompliant plaintiffs are excluded, or (b) not a class. On plaintiffs' view, § 1367(a) would authorize noncompliant plaintiffs to join or intervene in such an action as individuals (subject to the restrictions in § 1367(b)), but plaintiffs offer no explanation of how such noncompliant plaintiffs could be part of a certified class.

authorize supplemental jurisdiction over parties whose claims, by definition, eliminate the precondition for supplemental jurisdiction, to wit, the court's *original* jurisdiction.

This is made clear by § 1367's text in two ways. First, § 1367(a) requires that in order to exercise supplemental jurisdiction, the court must "have original jurisdiction." The statute does not authorize a court to exercise supplemental jurisdiction simply because the court has had original jurisdiction at some point in the past. Second, § 1367(a) requires that the court "have original jurisdiction" not just over a particular claim or claims, but over the "civil action." A court sitting in diversity lacks original jurisdiction over a civil action whenever a party who does not comply with § 1332 is part of an action. See, *e.g.*, *Schacht*, 524 U.S. at 389 ("[w]here original jurisdiction rests upon Congress' statutory grant of 'diversity jurisdiction,' this Court has held that one claim against one nondiverse defendant destroys that original jurisdiction").[8]

In this regard, it is critical that under established law, the joinder or aggregation of parties and claims has different implications for a court's "original jurisdiction" in federal-question and diversity "civil actions." The requirement that a civil action arise under federal law, 28 U.S.C. § 1331, is satisfied by the presence of a federal claim, whether or not the action also contains a state law claim. See *International Coll.*

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[8] *See also* App. 58a ("Some courts have held that the requirement of § 1367(a) is satisfied so long as the court has original jurisdiction over *any* of the claims specified in the complaint. However, a subsequent portion of § 1367(a) refers to particular 'claims in the [civil] action' over which the court has original jurisdiction. When Congress wanted to refer to individual claims in a complaint, it knew how to do so; when Congress wanted to refer to the civil action as a whole (encompassing *all* the claims in the complaint), it apparently knew how to do so, as well") (alteration in original).

of Surgeons, 522 U.S. at 166. "[F]ederal claims suffice to make the actions 'civil actions' within the 'original jurisdiction' of the district courts for purposes of removal," and the "presence of related state law claims" does not alter this analysis. *Id.* Similarly, the requirement of 28 U.S.C. § 1336 that the United States be a defendant in the action is fulfilled whenever the United States is a defendant, whether or not other defendants are sued. In both examples, the exercise of supplemental jurisdiction over claims outside the court's original jurisdiction does not defeat original jurisdiction.

In contrast, under the diversity statute, the presence of additional parties or claims can determine whether the court has "original jurisdiction" – *e.g.*, because the parties are not completely diverse or because the claims do not satisfy the amount-in-controversy requirement. If a plaintiff who fails to meet the jurisdictional minimum is part of a suit, the court's original jurisdiction is destroyed unless and until that plaintiff is dismissed. As noted above, a court does not have "original jurisdiction" under § 1332 over a class action filed on behalf of unnamed class members who do not meet the minimum-amount requirement. See *Zahn*, 414 U.S. at 301. The prerequisite for exercising supplemental jurisdiction is therefore unsatisfied. But § 1367(a) does not authorize a diversity court to exercise supplemental jurisdiction even if the class action is treated as an individual action by plaintiffs who satisfy § 1332 to which unnamed noncompliant class members are added. This is because at the moment those noncompliant plaintiffs are added, the court's "original jurisdiction" ceases, which deprives the court of the jurisdictional predicate for the exercise of supplemental jurisdiction over these plaintiffs.

This point is effectively illustrated in the class-action setting. The court does not have original jurisdiction over unnamed class members whose complaints fail to satisfy the minimum-amount requirement. On the Eleventh Circuit's

view, however, at the precise moment original jurisdiction is destroyed by the certification of a class which includes members who do not meet the minimum-amount requirement, supplemental jurisdiction is obtained. But, at the moment such a class is certified, the court does not "have original jurisdiction," so there is no basis for supplemental jurisdiction. The same act, class certification, cannot simultaneously eliminate original jurisdiction and effectuate supplemental jurisdiction.

2. Sections 1367(a) and (b) are, of course, integrated working parts of the same whole. To determine the meaning of statutory text, a court must not only define the words used in that text, but also examine the statutory structure and context. As this Court recently explained, "[s]tatutory construction is a 'holistic endeavor,'" and "'[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Koons Buick Pontiac*, No. 03-377, slip op. at 8. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (in construing a statute, the court examines "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). That is certainly the case here. Petitioner's reading of § 1367(a) is supported by its comfortable fit with § 1367(b), while the lower court's reading of § 1367(a), in conjunction with § 1367(b), produces bizarre results that cannot have been intended by Congress and that dramatically expand federal diversity jurisdiction.

Section 1367(b) provides that where original jurisdiction is founded on diversity:

> the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as

> plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when existing jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332. [28 U.S.C. § 1367(b).]

Section 1367(b) places two types of restrictions on employing supplemental jurisdiction in a diversity case. First, it orders courts not to exercise supplemental jurisdiction over claims *by plaintiffs* against defendants added to a civil action by the operation of Federal Rules of Civil Procedure 14, 19, 20, or 24, if § 1332 would have prevented plaintiffs from suing such defendants at the action's inception.[9] In addition, section 1367(b) says that persons may not join or intervene in a civil action as plaintiffs under Rules 19 and 24 if § 1332 would have prevented them from joining the action at its inception.

These restrictions prevent plaintiffs from using supplemental jurisdiction when doing so "would be inconsistent with the jurisdictional requirements of Section 1332." Pfander, *supra*, at 135. "More than merely confirming a general spirit of cautious restatement, subsection (b) offers strong structural support for [petitioner's] interpretation of the scope of subsection (a)'s grant of supplemental jurisdiction in diversity," which preserves the essential features of § 1332. *Id.*

Section 1367(b) basically preserves the case law developed in connection with the ancillary jurisdiction prior to § 1367's enactment. For example, § 1367(b) prohibits plaintiffs suing in diversity from using supplemental jurisdiction to file a claim against a defendant impleaded under Rule 14 if the claim could not have been asserted in the initial complaint. It

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[9] The type of joinder or intervention authorized by each Rule is described briefly in note 5 *supra*.

reflects this Court's decision in *Owens Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978), which holds that a plaintiff cannot sue a single defendant of diverse citizenship, wait for that defendant to implead a third party, and then employ ancillary jurisdiction to make a claim against the impleaded third party. *Id.* at 374. Similarly, § 1367(b) makes clear that a plaintiff cannot sue only diverse parties and defer claims against non-diverse parties until they are joined under Rules 19 and 20 or intervene under Rule 24. Nor can persons who would destroy diversity jurisdiction join a suit as plaintiffs or intervenors under Rule 19 and Rule 24, respectively.

The codification does alter pre-existing case law with respect to ancillary jurisdiction in diversity cases in one respect, but that change *reduces* the pre-existing scope of supplemental jurisdiction. Before § 1367 was enacted, federal courts with diversity jurisdiction were permitted to take ancillary jurisdiction over parties entitled to intervene of right under Federal Rule of Civil Procedure 24(a). See, *e.g.*, *Smith Petroleum Serv., Inc.* v. *Monsanto Chem. Co.*, 420 F.2d 1103, 1113-15 (5th Cir. 1970). In § 1367(b), Congress rejected this judicial judgment, in favor of narrowing diversity jurisdiction.

In sum, § 1367(b)'s provisions manifest a clear intent to prevent plaintiffs from using § 1367 to circumvent § 1332. If § 1367(a) is read to authorize courts with diversity jurisdiction to exercise supplemental jurisdiction only when doing so does not destroy that original diversity jurisdiction, then the parts of § 1367 work together harmoniously. They prevent the filing of a civil action that does not satisfy § 1332, including any class action, and foreclose the subsequent addition of parties whose participation contravenes § 1332.

In contrast, if § 1367(a) is interpreted to authorize supplemental jurisdiction over unnamed plaintiffs whose claims do not meet the minimum-amount requirement, the

statute as a whole will have far-reaching consequences – consequences Congress said it did not intend.

The most notable of these absurd consequences would be the wholesale revision of the limits on diversity jurisdiction embodied in this Court's interpretations of § 1332. Included in this revolution in federal diversity jurisdiction would be the demise of a rule that has endured for two centuries – the *Strawbridge* rule that in a multi-party civil action, the court has original jurisdiction only if the parties are completely diverse and each party satisfies the minimum-amount requirement. See *Strawbridge*, 7 U.S. (3 Cranch) at 267-68. Section 1367(b) does not expressly forbid a court with diversity jurisdiction to exercise supplemental jurisdiction over plaintiffs who are subsequently joined in an action under Rule 20. Thus, if § 1367(a) is interpreted to authorize a court to exercise supplemental jurisdiction over plaintiffs whose claims do not satisfy § 1332, one plaintiff whose claim satisfies those requirements can file a complaint, and then be joined pursuant to Rule 20 by numerous others whose complaints do not.

Petitioner's reading of § 1367(a) prevents this result by recognizing that once the additional plaintiff is added, the court loses its "original jurisdiction" over the "civil action," which is the predicate for supplemental jurisdiction. If *Strawbridge* is to survive, the "original jurisdiction" of the court over "civil actions" required by § 1367(a) must be destroyed by the addition of noncompliant plaintiffs after the complaint has been filed. Neither the complete diversity nor the minimum-amount requirement has any meaning if a court with original diversity jurisdiction over a single plaintiff can exercise supplemental jurisdiction over all other plaintiffs whose claims satisfy neither.

The Eleventh Circuit's interpretation also results in an incoherent statutory structure. According to the lower court, Congress carefully prevented plaintiffs from circumventing § 1332's requirements at the complaint stage and by use of

Rules 14, 19 and 24, while allowing destruction of those requirements by permitting the subsequent addition of noncompliant plaintiffs under Rules 20 and 23. Under that interpretation, Congress intended to invite plaintiffs whose claims do not meet § 1332's requirements to join state-law actions in federal court, while simultaneously barring similarly-situated plaintiffs from joining or intervening in such actions under Rules 19 and 24. Accordingly, Congress is deemed to have relaxed § 1332's requirements for plaintiffs whose presence is not required (those joined under Rule 20), and to have refused to do so for plaintiffs whose presence is necessary for just adjudication (those not joined under Rule 19). As Judge Easterbrook inquired, "What sense can this make?" *Stromberg Metal Works, Inc.* v. *Press Mech., Inc.*, 77 F.3d 928, 932 (7th Cir. 1996).

Lower courts have acknowledged that, in light of § 1367(b), reading § 1367(a) to authorize courts with original diversity jurisdiction to exercise supplemental jurisdiction over plaintiffs whose claims do not satisfy § 1332 has the absurd consequences detailed above, and yet have nonetheless felt constrained to accept those consequences. These courts read § 1367(a) to authorize supplemental jurisdiction to the full extent permitted by the Constitution whenever a court had original jurisdiction over any claim, and thus read § 1367(b) as the exclusive source of restrictions of the scope of supplemental jurisdiction in diversity cases. Because neither Rule 23 nor Rule 20 appears in § 1367(b)'s list of exceptions to supplemental jurisdiction, these courts have concluded that they have supplemental jurisdiction over unnamed class members and other plaintiffs who do not satisfy § 1332. App. 76a.

As shown above, however, § 1367(a) authorizes supplemental jurisdiction only over civil actions within the court's original jurisdiction. In diversity cases, the court's original jurisdiction is defined by § 1332, as interpreted by this Court, and it does not include, *inter alia*, class actions in

which unnamed plaintiffs do not satisfy the minimum-amount requirement. See *Zahn*, 414 U.S. at 294-96; *Snyder*, 394 U.S. at 336-38; *Clark*, 306 U.S. at 589-90. Thus, there was no reason to include Rule 23 (or Rule 20) in the list of aggregation/joinder mechanisms that could not be used to circumvent the diversity requirements of § 1332. Indeed, section 1367(b) simply makes sure that the plaintiffs excluded at the complaint stage by the gatekeeper (§ 1332 as incorporated in § 1367(a)'s requirement of original jurisdiction), are not let in the back door.

In addition, as Judge Tjoflat suggested, the list of aggregation rules in § 1367(b) – a list intended to prevent circumvention of § 1332 – need not be read as exclusive. See App. 61a (rejecting the application of the "*expressio unius*" canon of statutory construction, and advocating instead a kind of *ejusdem generis* construction); *id.* at 61a n.30 ("[a] troubling question concerning § 1367(b) is whether a plaintiff may be able to evade many of these restrictions by simply including such people in the original complaint (or in an amended complaint), rather than making them parties through the specified rules. I am dubious that jurisdictional restrictions could be circumvented through such procedural ploys").[10]

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[10] Some lower courts have feared that § 1367 would be rendered meaningless if § 1367(a) were interpreted to require a federal court to have "original jurisdiction" over a diversity-based action in order to exercise supplemental jurisdiction over unnamed class members or other plaintiffs whose claims do not comply with § 1332. They believe that under such an interpretation, § 1367 would authorize a court to exercise supplemental jurisdiction only with respect to claims over which it already has jurisdiction. That is not true.

First, *Finley* casts doubt on whether federal courts could exercise any supplemental jurisdiction without a statutory authorization. Section 1367 provides such an authorization, a substantial act in and of itself. Second, § 1367(a) authorizes a court with "original" federal-question jurisdiction

Taken as a whole, § 1367 is best read to say that in diversity actions, federal courts do not have supplemental jurisdiction over those whose complaints do not meet the minimum-amount requirement. The absurd results arising from the Eleventh Circuit's interpretation of § 1367 militate strongly against its adoption. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (absurd results weigh heavily against particular reading of statutory text). In contrast, if, as petitioner contends, § 1367(a) does not authorize federal courts sitting in diversity to exercise supplemental jurisdiction over persons whose claims do not satisfy the minimum-amount requirement, then § 1367(b) simply prevents plaintiffs from later adding parties who also could not have been included at the outset under § 1332. This "sensible" and coherent reading of the text should be adopted. *Bank One Chi., N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 275 (1996).

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to exercise supplemental jurisdiction over all state law claims arising out of the same case or controversy, including those claims that require the joinder or intervention of other parties. (That is, § 1367 overrules *Finley*, which held that courts with federal-question jurisdiction lack such supplemental jurisdiction over other parties, 490 U.S. at 546-47, 556.) Third, § 1367 codified pre-existing law with respect to § 1332 by authorizing courts with diversity jurisdiction to exercise supplemental jurisdiction over claims by defendants (including compulsory counterclaims, cross-claims, and third-party claims, Fed. R. Civ. P. 13(a), (g), 14(a), 18(a)), even when those claims are based in state law and could not be asserted in federal court as a matter of original jurisdiction. In addition, in diversity actions, supplemental jurisdiction would extend to "all claims asserted by plaintiffs in a defensive posture solely in response to a claim asserted against the plaintiff by some other party to the action," which would include compulsory counterclaims against the original defendant and "cross-claims and impleader claims against other parties to the action that are precipitated by the claim asserted against the plaintiff." Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 948-49 (1992).

3. Even assuming that the text and structure of § 1367 would permit the lower court's interpretation, established rules of statutory construction strongly support petitioner's reading of § 1367. There are four rules of statutory construction that, taken separately and in combination, compel the conclusion that petitioner's reading of § 1367 is the better one.

For more than a century, Congress has acted to narrow the scope of diversity jurisdiction. See *Snyder*, 394 U.S. at 339. Congress has done so by raising the minimum-amount requirement periodically, and by accepting the Court's restrictive interpretation of § 1332. For example, in 1989, just one year before § 1367 was enacted, Congress increased the minimum amount for diversity jurisdiction from $10,000 to $50,000. See H.R. Rep. No. 100-889, at 45 (1988) (estimating that the federal judiciary's diversity caseload might decrease as much as 40% as a result of the increase). As this Court explained:

> Congress has thus consistently amended the amount-in-controversy section and re-enacted the "matter in controversy" language without change of its jurisdictional effect against a background of judicial interpretation that has consistently interpreted that congressional enacted phrase as not encompassing the aggregation of separate and distinct claims. . . . [T]he settled judicial interpretation of "amount in controversy" was implicitly taken into account by the relevant congressional committees in determining, in 1958, the extent to which the jurisdictional amount should be raised. . . . Where Congress has consistently re-enacted its prior statutory language for more than a century and a half in the face of a settled interpretation of that language, it is perhaps not entirely realistic to designate the resulting rule a "judge-made formula." [*Snyder*, 394 U.S. at 339.]

See also *Zahn*, 414 U.S. at 302 (had Congress intended to alter the minimum-amount requirement, "some express statement of that intention would surely have appeared" in amending § 1332 or in the legislative history of such amendments); *Kroger*, 437 U.S. at 374 (the longevity of the complete diversity rule "clearly demonstrates a congressional mandate" for the rule).

Nothing in § 1367 indicates – let alone clearly expresses – a congressional intent to alter the minimum-amount requirement in any diversity case, and certainly not in the class action setting. Indeed, the statute as a whole strongly conveys the opposite meaning.

Second, in the diversity-jurisdiction setting, federal courts are empowered to adjudicate state law claims – *viz.*, claims that presumptively should be left to state tribunals. See *Speiser* v. *Randall*, 357 U.S. 513, 523 n.7 (1958) (reciting the "basic constitutional principle that the construction of state laws in the exclusive responsibility of the state courts"). Indeed, in *Snyder*, this Court indicated that its reluctance to expand the federal courts' diversity jurisdiction stemmed at least in part from respect for state sovereignty. As the Court said: "'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [§ 1332] has defined.'" 394 U.S. at 340 (quoting *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934)).

The Eleventh Circuit's interpretation of § 1367 would substantially increase the scope of diversity jurisdiction. In nearly all cases, one of the parties would prefer a federal forum, with the consequence that where a class representative or plaintiff in a multi-plaintiff case satisfies § 1332, that case will end up in federal court. The state courts' historic power to decide state-law claims should not be so thoroughly displaced absent some clear statement of Congress. See *id.* (in light of *Ben-Hur*, "[t]o allow aggregation of claims where only one member of the entire class is of diverse citizenship

could transfer into the federal courts numerous local controversies involving exclusively questions of state law"); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (Congress must make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States) (quotations omitted). Plainly, section 1367 should not be given the expansive interpretation that plaintiffs advocate.

Third, jurisdictional limitations ensure that the federal courts do not upset the balance of power among the branches of the federal government by "keep[ing] the federal courts within the bounds the Constitution and Congress have prescribed." *Ruhrgas AG*, 526 U.S. at 583. In manifesting its respect for Congress' role in defining federal court jurisdiction, this Court has routinely recognized the delicacy of the fact that "the courts themselves must decide whether their own jurisdiction has been expanded." See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985). In this setting, in order to conclude that Congress "enhanced" federal court jurisdiction, the Court has required "the clearest indications" from Congress of its decision to do so. *Id.*

Finally, the court of appeals' interpretation of § 1367 assumes that Congress overruled *Zahn*. This Court does not permit the lower courts to infer that it has implicitly overruled one of its decisions. See *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Nor should a congressional overruling of a Supreme Court decision be lightly inferred, particularly where, as here, Congress has enacted a new federal statute accompanied by an uncontested congressional report explicitly declaring Congress's intent to preserve that decision. See *infra at* I.B.

These principles of statutory interpretation, separately and in combination, show that the text of § 1367 should be interpreted to authorize supplemental jurisdiction in diversity cases only where its exercise "consistent with the requirements of § 1332."

B. The Legislative History Of § 1367 Conclusively Establishes Congress's Intent To Preserve *Zahn* And The Minimum-Amount Requirement.

What we have said so far demonstrates that based on its text and structure and established principles of statutory interpretation, § 1367 does not authorize federal courts sitting in diversity to exercise supplemental jurisdiction over unnamed class members whose claims do not satisfy the minimum-amount requirement. The legislative history conclusively demonstrates that this was Congress's intent. The pertinent House Report states that § 1367 "*is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley.* [n.17]" House Report at 29 (emphasis supplied). And, note 17 expressly cites and preserves *Zahn*. The Senate adopted the House Report. Rarely does the section-by-section analysis of the pertinent, uncontroversial committee report so directly address the precise legal issue presented by a case.

A longer exposition of the legislative history leads inexorably to the same conclusion. Section 1367 originated in a report written by the Federal Courts Study Committee, a body established by Congress in 1988. See 28 U.S.C. § 331 (1988). That committee conducted "the most comprehensive examination of the federal court system in the last half century," and recommended more than 100 changes in the administration of the federal courts. See Fed. Courts Study Comm., 101st Cong., *Report of the Federal Courts Study Committee* 3, 171-86 (Comm. Print 1990) ("Study Committee Report").

Specifically, the Study Committee Report found that one of the most serious problems confronted by the federal judiciary was its immense and growing docket, considered by the Committee to be a "crisis." *Id.* at 4-10. A primary source of this crisis was the federal courts' diversity jurisdiction, which was threatening the accessibility of the federal courts to

federal claimants. *Id.* at 14. The Committee recommended that Congress reduce the scope of diversity jurisdiction.[11] Relevant here, in doing so, the Committee rejected a proposal by a subcommittee that *Zahn* be overruled. See 1 Fed. Courts Study Comm., *Working Papers and Subcommittee Reports* 561 n.33 (July 1, 1990), *discussed in Meritcare, Inc.* v. *St. Paul Mercury Ins. Co.*, 166 F.3d 214, 219 (3d Cir. 1999).

While the Study Committee was doing its work, this Court decided *Finley* v. *United States*, 490 U.S. 545 (1989). In that case, the Court held that a court with federal question jurisdiction over a Federal Tort Claims Act claim against the United States did not have "pendent party" jurisdiction over the plaintiff's state-law claims against other defendants, and indicated that extensions of pendent and ancillary jurisdiction should receive express congressional authorization. *Id.* at 546-47, 556. This decision was seen as "surprising" because most lower courts had concluded that federal district courts had pendent party jurisdiction in federal-question cases, and because some perceived it as a threat to any judge-made law concerning ancillary or pendent jurisdiction. 13B Wright et al., *Federal Practice and Procedure* § 3567.2, at 80-81 (Supp. 2004).

As a result, after *Finley*, the Federal Courts Study Committee recommended that "Congress expressly authorize federal courts to hear any claim arising out of the 'same transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties." Study Committee Report at 47, *quoted in Raygor* v. *Regents*

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[11] Indeed, the Committee proposed the abolition of diversity jurisdiction except in a limited set of cases. *See* Study Committee Report at 38-45. In the alternative, the Committee recommended the significant curtailment of diversity jurisdiction in several ways, including raising the amount in controversy requirement to $ 75,000. *Id.* at 42.

of Univ. of Minn., 534 U.S. 533, 540 (2002). See also Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional and Statutory Analysis*, 24 Ariz. St. L. J. 849, 859 (1992) ("the apparent thrust of the Committee's recommendation was that Congress formally codify the existing doctrines of pendent claim and ancillary jurisdiction and authorize pendent party jurisdiction in federal question cases").

H.R. 5381, entitled "Federal Court Study Committee Implementation Act of 1990," which was introduced in the House of Representatives in July 1990. Section 120 of that bill addressed supplemental jurisdiction, but it differed significantly from the version later enacted. In particular, on September 6, 1990, Judge Weiss, the Chair of the Study Committee, testified before a subcommittee of the House Judiciary Committee and objected to § 120 as inconsistent with the Study Committee's recommendations regarding supplemental jurisdiction because it expanded diversity jurisdiction. See *Federal Court Study Committee Implementation Act & Civil Justice Reform Act: Hearings on H.R. 5381 & H.R. 3898 Before the Subcomm. on Courts, Intellectual Property & the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 92-94 (1990) (statement of Judge Joseph F. Weis, Jr.). He explained that § 120 would "change the doctrine of complete diversity articulated in *Strawbridge* v. *Curtiss*, 3 Cranch 267 and *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978)" and that "[t]he Study Committee did not intend to encourage additional diversity litigation." *Id.* at 94. He urged the Committee to treat federal question and diversity cases differently and to reduce the scope of § 120 to reflect the Study Committee's view that "the requirement of complete diversity in § 1332 cases should be continued as it presently exists and should not be eroded through operation of the proposed supplemental jurisdiction." *Id.* at 95.

H.R. 5381 was then redrafted and emerged with a wholly different supplemental jurisdiction provision, now § 114. See H.R. 5381, 101st Cong., § 114 (Sept. 27, 1990); *id.* (Oct. 2, 1990). This is the provision enacted as § 1367.

The House Report on redrafted H.R. 5381 stated that "[t]he purpose of H.R. 5381 is to implement several of the more noncontroversial recommendations of the Federal Courts Study Committee." House Report at 15; see also *id.* (describing provisions as "modest proposals that, but for the work of the Federal Courts Study Committee, might not have come to the attention of Congress at all"). Section 114 (now § 1367) was described as "implement[ing] a recommendation of the Federal Courts Study Committee." *Id.* at 27.

More substantively, the House Report noted that "in *Finley* v. *United States*, 109 S. Ct. 2003 (1989) [490 U.S. 545 (1989)] the Supreme Court cast substantial doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction." *Id.* at 28. The House Report states that *Finley* "threatens to eliminate other previously accepted forms of supplemental jurisdiction," citing as an example the dismissal of an impled defendant who was not diverse. *Id.* at 28 & n.14. Thus, the House Report explained that § 1367 "essentially restore[d] the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction." *Id.*

The House Report then details that pre-*Finley* understanding in terms that are precisely on point and worth quoting in full:

> In federal question cases, [§ 1367] broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims, including claims involving the joinder of additional parties. *In diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute* . . . .

[Section 1367(a)] generally authorizes the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim or claims that provide the basis of the district court's original jurisdiction. [n.15] In providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley* v. *United States*.

[Section 1367(b)] prohibits a district court in a case over which it has jurisdiction founded solely on the general diversity provision, 28 U.S.C. § 1332, from exercising supplemental jurisdiction in specified circumstances. [n.16] In diversity-only actions the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdiction requirement of 28 U.S.C. § 1332 by the simple expedient of naming *initially* only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis. In accord with case law, the subsection also prohibits the joinder or intervention of persons a[s] plaintiffs if adding them is inconsistent with section 1332's requirements. *The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley*.[n.17].

. . . .

[n.17] *See Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356 [] (1921); *Zahn* v. *International Paper Co.*, 414 U.S. 291 [] (1973). [House Report at 28-29 & n.17 (emphasis supplied).]

The House Report goes on to note that § 1367(b) does alter pre-*Finley* practice in one "small" respect by excluding Rule 24(a) intervenors whose intervention is not consistent with complete diversity. *Id.* at 29.

The Senate Judiciary Committee adopted the House Report. See 136 Cong. Rec. S17580-81 (daily ed. Oct. 27, 1990).

One point is critical. Far from suggesting any change in *Zahn*, the legislative history in the form of an uncontroversial committee Report points in precisely the opposite direction – *viz.*, it states that the minimum-amount requirement for diversity jurisdiction under § 1332 is unchanged, that § 1367 should not be interpreted to contravene § 1332, and that § 1367 does not overrule *Zahn*. The legislative history should be treated as compelling not only because it supports the best reading of the text and is clear and one-sided, but also because committee reports are considered by this Court to be an authoritative source of congressional intent. See *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[ts] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation'") (quoting *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969)).

The legislative history unequivocally demonstrates both a general congressional intent to limit diversity jurisdiction and a specific congressional intent to preserve *Zahn*. Petitioner submits that the text and structure of § 1367 clearly support its reading of § 1367; but even if they did not, the court of appeals' reading should be rejected because it "produce[s] a result demonstrably at odds with the intentions of its drafters," and in that circumstance, "the intention of the drafters, rather than the strict language, controls." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Cf. *Koons Buick Pontiac*, No. 03-377, slip op. at 13 ("there is

scant indication Congress meant to change the well-established meaning of [the statute]").

In sum, § 1367 "overrule[s] *Finley* in federal-question cases but . . . enable[s] the federal courts to retain the pre-*Finley* rules of diversity jurisdiction, in keeping with the views outlined in the House Report that accompanied the statute." Pfander, *supra*, at 128.

II. THE JUDGMENT SHOULD BE VACATED BECAUSE THE COURT WAS WITHOUT POWER TO ACT.

1. If *Zahn* is the law, the district court lacked jurisdiction over this class action. The class was defined to include members who did not satisfy the minimum-amount requirement, and the district court certified this class and then tried and decided this case based on the erroneous assumption that it had subject-matter jurisdiction over the class and the case. But, the courts below never had power in this case, and the judgment entered must now be vacated. See *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 16-19 (1951) (vacating judgment where diversity jurisdiction did not exist at the time of the judgment); *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 76-77 (1996) ("if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated").

Any other result would rob *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), of vitality. There, this Court held that a federal court must first decide a contested issue of subject-matter jurisdiction before otherwise proceeding with a case. *Id.* at 109-10. That is because the courts are without power to act if they lack jurisdiction, and jurisdiction may be neither presumed nor retroactively conferred. See *Finn*, 341 U.S. at 18; Fed. R. Civ. P. 12(h)(3) ("[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). Cf. *Caterpillar*, 519 U.S. at 77 (affirming judgment even though the district

court lacked jurisdiction when the case was removed to district court *because "no jurisdictional defect lingered through judgment in the District Court"*) (emphasis supplied).

Moreover, this is not one of those cases where an "[a]ppellate-level amendment[] to correct [a] jurisdictional defect[]" is permissible. *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 836 (1989). This Court has recognized that such amendments are not "intellectually satisfying" because, in essence, they retroactively ratify judicial acts that the court was without power to take. *Id.* at 836-37. And, the Court has noted that such amendments may be used only "sparingly" – *e.g.*, where a dismissal of the suit would simply result in the suit being "refile[d] in the District Court" and "proceed[ing] to a preordained judgment." *Id.* at 837. The Court has admonished, however, that where "the dismissal of the nondiverse party will prejudice any of the parties in the litigation" or where "the presence of a nondiverse party produced a tactical advantage of one party or another," the case should be remanded so that the district court could make a determination of the prejudice to the defendant and decide how to proceed. *Id.* at 838.

Here, it is evident that the presence of the non-diverse parties "produced a tactical advantage" for plaintiffs and prejudiced petitioner in numerous respects. Most obviously, as a general matter, the tactics of class action litigation differ substantially from the tactics of multi-party litigation; and, more specifically, those tactics are also affected by the size of the class proposed to be certified. The definition and certification of a massive class creates an enormous tactical advantage for plaintiffs. It affects virtually every litigation choice made; indeed, it places intense pressure on a defendant to settle. See, *e.g, Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). In addition, the class definition here altered the proof of liability and damages in this case. The sole evidence offered on this topic was expert testimony based on data aggregated from *all* national Exxon dealers, not just the

differently-situated larger dealers over whom the court would have had jurisdiction. See *infra*. Had a lawful class been defined, plaintiffs' expert could not have relied on the aggregated, national data to establish that Exxon violated its contracts with individual dealers or to compute the amount of such damage.

The judgment should therefore be vacated, and the case remanded to the district court to be dismissed. Plaintiffs would, of course, be free to attempt to file a new case over which the court would have subject-matter jurisdiction.

2. The prejudice and tactical advantage resulting from the wrongful assumption of subject-matter jurisdiction over the class action can be concretely illustrated by two examples.

a. First, a class certification inquiry is based on a class defined in a particular way. If the defined class is unlawful, the class must be redefined and the Rule 23 standards must be applied to the new class. Thus, if plaintiffs choose to file a new case, they must lawfully define a class, and then the court will have to assess whether a lawfully-defined class can be certified under the standards set forth in Rule 23. Clearly, the "old" certification inquiry is no longer valid.

The court below applied Rule 23 to a class defined to include all U.S. Exxon dealers who operated during a certain time period. That class definition cannot survive a determination that the federal courts lack jurisdiction over the numerous class members whose claims do not satisfy the minimum-amount requirement. Instead, if a new complaint were to be filed and a new class defined, the court would have to consider whether a class defined to exclude all dealers whose claims do not satisfy the minimum-amount requirement can be certified as a Rule 23(b)(3) class for damages. Such a class presents, at the very least, significantly different issues of manageability and superiority than does the more simple class definition of all dealers who operated within a particular time period.

The necessity for vacatur of the class certification is evident in this Court's decision in *Zahn*, affirming the lower courts' refusal to certify any class once it became clear that the court had subject-matter jurisdiction over named plaintiffs, but not over numerous unnamed plaintiffs. See 414 U.S. at 302. Indeed, the district court in *Zahn* immediately grasped how the jurisdictional question would impact the class-certification ruling. When it confronted the propriety of allowing the proceedings in *Zahn* to move forward as a class action, the district court observed that it had "initially [to] determine whether there is jurisdiction over all the members of the proposed class." *Zahn* v. *International Paper Co.*, 53 F.R.D. 430, 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973). After observing that it was clear that some putative class members' claims would not satisfy the jurisdictional amount, and following a thorough and detailed analysis of *Snyder* and other cases, the court concluded that each member of the class must individually satisfy the jurisdictional amount. *Id.* at 432. Only at that point did the court assess whether a viable class existed. *Id.* at 433-34.

The reason is simple and commonsensical: only after the plaintiff class is defined can a court grasp the actual hurdles to permitting the case to proceed as a class action. The *Zahn* district court understood that the rule requiring each class member to satisfy the amount in controversy requirement substantially impacts the manageability of the case as a class action, and its superiority to other methods of adjudication, and therefore that the scope of the court's subject-matter jurisdiction had to be resolved before the class-certification question could be decided. And, once the court recognized that it lacked subject-matter jurisdiction over unnamed class members, it proceeded to analyze the class defined to exclude such class members and concluded that no such class should be certified.

The litigation in this case, too, illustrates why a court must assess its subject-matter jurisdiction before making substantive decisions about class certification. Indeed, the proceedings that led to the class certification in this case were wholly inconsistent with *Steel Company*, where this Court held that a federal court must decide whether it has subject-matter jurisdiction before otherwise proceeding with a case. When the district court was considering whether to certify the class in this case, Exxon argued, *inter alia*, that the class should not be certified because certain absent class members' claims were insufficient to meet the jurisdictional amount, and hence the court lacked subject-matter jurisdiction over such a broad class under *Zahn*. The magistrate (whose reasoning and recommendation to certify the class was accepted by the district court, App. 222a) noted the subject-matter jurisdiction issue, but believed that he could proceed with the litigation while postponing the question whether absent class members' claims satisfied the jurisdictional amount. *Id.* at 244a (citing *Kaiser Gypsum Co.* v. *Kelley* (*In re School Asbestos Litig.*), 921 F.2d 1310, 1316 (3d Cir. 1990), and *Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1195-96 (6th Cir. 1988)).

The procedure employed, however, was flatly contrary to *Steel Co.* which reaffirmed the longstanding rule that "'[w]ithout jurisdiction the court cannot proceed at all in any cause.'" 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94-95 (alteration in original) (quoting *Mansfield, C. & L.M.R. Co.* v. *Swan*, 111 U.S. 379, 382 (1884)). The district court had an obligation to ensure that it had subject-matter jurisdiction before proceeding with any other aspect of the case, including the class certification. Cf. *Schacht*, 524 U.S. at 388 ("A *case* falls within the federal district court's 'original' diversity

'jurisdiction' only if diversity of citizenship among the parties is complete . . . .") (emphasis supplied). Instead, the district court ruled on class certification before determining whether it had subject-matter jurisdiction, doing precisely what *Steel Co.* prohibits.[12]

"Much more than legal niceties are at stake here." 523 U.S. at 101. Where, as here, the district court defers the jurisdictional question, it alters and distorts the class-certification analysis. And, that in turn distorts the entire course of litigation in numerous ways. We demonstrate below that the erroneous certification of a class over which the court lacked jurisdiction allowed plaintiffs to prove their case and quantify damages with aggregated national data that they could not have relied on had a lawfully limited class been defined and certified. In addition, there are practical considerations that strongly support deciding the subject-matter jurisdiction question prior to class certification.

As noted, class certification fundamentally alters a defendant's litigation tactics in a case. Most notably, it

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[12] As noted, this Court has held that Fed. R. Civ. P. 21 authorizes the federal courts to dismiss nondiverse, dispensable parties at any point in the litigation if the presence of such a party would destroy the federal court's subject-matter jurisdiction over the case. *Newman-Green, Inc.*, 490 U.S. at 832-38. *Newman-Green*, decided before *Steel Co.*, merely allows the federal courts to retain a case when, through oversight, a party whose presence destroys jurisdiction was permitted to participate in the case, and the other party was not thereby prejudiced. *Id.* at 828 (jurisdictional defect was not noted or considered until oral argument in the court of appeals). Moreover, Rule 21 applies only to "misjoinder" of parties and has nothing to do with class certification orders under Rule 23 which do not involve "joinder" at all. Nothing in *Newman-Green* suggests or authorizes a district court to set aside a known jurisdictional question, and postpone it until after it proceeds with other matters in the case. *Steel Co.* squarely addresses that question, and leaves no room for doubt how a district court should proceed. The court should resolve the jurisdictional question *before* ordering the class certified.

significantly increases the immense financial pressure on a defendant to settle a multi-plaintiff case. *Coopers & Lybrand*, 437 U.S. at 476. Any defendant who settles class litigation will do so only in exchange for peace and finality. But dismissal of a class action with prejudice is effective only to the extent the court had jurisdiction over the case. *Costello* v. *United States*, 365 U.S. 265, 285 (1961) ("fundamental jurisdictional defects which render a judgment void and subject to collateral attack [include] lack of jurisdiction over the ... subject matter"). A substantial question whether all members' claims satisfy the jurisdictional amount is thus a significant barrier to the settlement of class actions. Indeed, it is not difficult to imagine a successor *class* action of putative plaintiffs claiming to have been damaged by less than the jurisdictional amount. Petitioner lost the opportunity to litigate and to settle this case based on a lawful delineation of the scope of the court's subject-matter jurisdiction.

Class-certification decisions determine the course of litigation and have a profound effect on litigation tactics. This case was litigated on the basis of, and necessarily affected by, the unlawfully defined class. The judgment in this case must be vacated.

b. The district court's decision to allow the case to proceed as a class including *all* dealers, even those whose claims do not satisfy the jurisdictional amount, distorted the trial and judgment in this case in another way. The plaintiffs' underlying liability theory was predicated on expert testimony that assumed *all* dealers were properly asserting claims before the court and that relied on national average data that, by definition, described all U.S. Exxon dealers in the aggregate before and after the DFC program through 1988. Tr. 2668. Finding that the national average margins of Exxon dealers declined both as an absolute matter and as compared to competitor dealers' margins during the same period, plaintiffs' expert opined that the Exxon dealers' absolute and relative decline must have been caused by the elimination of

the DFC offset, thereby "proving" that the offset had been eliminated. Tr. 2667-71, 2678-87.

But if plaintiffs' expert had been asked to analyze Exxon's liability to its large-claim dealers, it is impossible to know whether the result would have been the same – whether, that is, the dealers properly included in the class would have shown the same decline in absolute and relative margins as the erroneous class of all dealers. If a lawfully-defined class had shown no decline, or a substantially smaller decline, plaintiffs' expert could not have concluded that the DFC offset "must have been eliminated" for those dealers. In fact, plaintiffs' expert could not have applied his analysis at all to a class properly defined to include only those dealers with large volumes and claims, because the pre-1988 data set on which he relied does not include information on an individual dealer basis. Tr. 3551-52.[13] It is thus impossible to know how plaintiffs would have proved their case if a lawfully-defined class had been certified, and the national average margin data could not be used. Plaintiffs potentially would have had to prove their cases based on some other statistical or individualized showing of harm, rather than on a sweeping presumption derived from national aggregate data.

Plaintiffs' liability theory depended on expert testimony that was predicated on the erroneous class definition in another respect as well. A fundamental element of plaintiffs' theory was that Exxon sought to separate Exxon's profitable

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[13] The inability to analyze pre-1988 data for only part of the class also would have fatally infected his analysis of the 1988-1994 period, which merely examined whether Exxon's margins changed so as to suggest a "give-back" of the offset, *assuming* it had been eliminated based on the analysis of the pre-1988 data. Tr. 2684-87. Accordingly, the expert opinion linchpin of plaintiffs' case – that the DFC offset must have been eliminated because of the decline in Exxon dealers' margins – would not have been presented to the jury, had the case been tried with a properly defined class.

dealers from its "[m]arginal stores" – its "keepers" from its "non-keepers." Tr. 4343-44, 4389; Op. to Cert. 5. Plaintiffs argued that Exxon wanted to "pick and choose" from among its dealers, strengthening the "keepers" while forcing the demise of the less-profitable "non-keepers." Op. to Cert. 5.

To support that theory, plaintiffs' expert compared the attrition in Exxon dealers across the class with the attrition in dealers experienced by Exxon's competitors. Tr. 2705-12. Finding that Exxon's dealer attrition rate was higher than its competitors', plaintiffs' expert concluded that Exxon must have been consciously trying to force out the more marginal class members. *Id.* at 2711-13. Again, however, if plaintiffs' expert had analyzed only the claims of dealers properly included in this action, it is impossible to know whether the attrition rate among Exxon dealers would have been higher than the rate among its competitor dealers. If anything, the opposite inference is more plausible. The dealers excluded from the class would surely include many of the marginal dealers supposedly squeezed out by Exxon; accordingly, the attrition rate among the properly included dealers should be lower than the rate among all dealers. The analysis by plaintiffs' expert of the improperly defined, overinclusive dealer class thus necessarily infected plaintiffs' underlying liability claims.

In light of the way plaintiffs sought to prove their case, the jurisdictional ruling in this case almost certainly had a substantial effect on the jury's judgment and award. For this reason, too, this Court should vacate the judgment.

Because the district court lacked subject-matter jurisdiction, it was without power to either certify the class or enter the judgment in this case. The judgment is therefore a nullity and should be vacated.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT G. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

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* Counsel of Record

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EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS

EUGENE E. STEARNS*
MARK P. DIKEMAN
MONA E. MARKUS
MATTHEW W. BUTTRICK
DAVID C. POLLACK
STEARNS WEAVER MILLER
WEISSLER ALHADEFF
& SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, FL 33130
(305) 789-3200

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY
& ALLEN, P.A.
150 West Flagler Street
Suite 2000, Museum Tower
Miami, FL 33130
(305) 371-2223

Attorneys for Respondents

* *Counsel of Record*

192152

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDINGS

Respondents (herein "Plaintiffs") incorporate by reference Exxon's identification of the parties to this proceeding in its brief. With respect to each of the corporate Respondents (all identified corporations other than Exxon Mobil Corporation), there is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in the corporate Respondent.

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OPINIONS BELOW

In addition to the opinions identified in Exxon's brief, the district court's orders addressing the collective nature of Exxon's "on average" pricing obligation to all dealers, and Exxon's "on average, over time, across all markets" test of its performance of the obligation, are reported at 157 F. Supp. 2d 1291 (Order on Post-trial Procedure), 61 F. Supp. 2d 1335 (*Daubert* Order), 61 F. Supp. 2d 1308 (Order Denying Summary Judgment), 61 F. Supp. 2d 1300 (Order on Motion *in Limine*). Non-published orders are included in the record below at Doc. 1463 (Order Denying Rule 50 and 59 Post-Trial Motions), Doc. 912 (Order Denying Decertification), Doc. 908 (Order Denying Summary Judgment).[1] The transcript of the district court's recent order rejecting Exxon's assertion that a lack of supplemental jurisdiction over the lesser class members will require a retrial of the entire action is at Doc. 1778 at 38.

STATEMENT OF THE CASE

INTRODUCTION

In May 1991, the named Plaintiffs, Exxon service station dealers who were party to motor fuel sales agreements with Exxon, brought suit in federal district court on behalf of themselves and all others similarly situated. Their class action complaint alleged that, in connection with a program implemented by Exxon called "Discount for Cash," Exxon had undertaken a contractual obligation to all of its dealers to offset millions of dollars of credit cost recovery fees with "on average" reductions in the wholesale price of motor fuel. J.A.1. Plaintiffs claimed that Exxon breached the obligation, entitling them to recover damages.

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1. References to the record below shall be designated "Doc." for district court docket entries, "P.Ex." and "D.Ex." for Plaintiffs' and Exxon's trial exhibits, respectively, and "Doc. _ Tr._" for the trial transcript. J.A. refers to the Joint Appendix, and "Pet. App." refers to the Petitioner's Appendix.

Each of the named Plaintiffs met the requirements for diversity jurisdiction, as their citizenship was diverse from Exxon's, and their initial claims exceeded the then-$50,000 jurisdictional minimum under 28 U.S.C. § 1332. The putative class included many thousands of dealers whose claims also exceeded the jurisdictional minimum.[2] In addition, relying on 28 U.S.C. § 1367, which was adopted by Congress shortly before the complaint was filed, the named Plaintiffs also sought to include thousands of other Exxon dealers whose initial claims, standing alone, would not satisfy the jurisdictional minimum. Those class members are referred to herein as the "lesser claimants" and their claims as the "lesser claims."

This Court has accepted review of the district court's decision, affirmed by the Eleventh Circuit, that pursuant to the clear and unambiguous language of § 1367, the district court's original jurisdiction over the claims of the named Plaintiffs confers supplemental jurisdiction over the claims of those absent class members who do not independently meet the jurisdictional minimum. Both the district court and the Eleventh Circuit concluded that § 1367 overruled the outcome of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

Exxon's petition for writ of certiorari asked this Court to review and resolve the "split [among the circuits] concerning the continuing validity of *Zahn* . . . which holds that '[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case.'" Exxon Pet. at 2. In particular, the question presented asks:

2. According to the most recent data, which includes claims filed immediately prior to the December 1, 2004 claims filing deadline, over eighty percent (80%) of the total damages is owed to more than 4,000 dealers and former dealers whose initial claims, like those of the named Plaintiffs, independently exceed the $50,000 jurisdictional minimum. The amount in controversy is determined as of the time the complaint is filed. In May 1991, the Plaintiffs reasonably believed their damages were 1.7 cents per gallon, plus the value of their additional claims. J.A. 1.

> Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts with diversity jurisdiction over the individual claims of named plaintiffs to exercise supplemental jurisdiction over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement of 28 U.S.C. § 1332?

J.A.9. Because both the plain language of § 1367 and the legislative history of the statute (if the legislative history is even relevant) compel the conclusion that the statute overruled the outcome in *Zahn*, the answer to Exxon's question is "yes," and the decision of the lower court should be affirmed.

BACKGROUND FACTS AND CIRCUMSTANCES

Had Exxon confined its brief to the narrow question upon which the Court granted review – whether *Zahn* requires dismissal of the lesser claimants – this brief would have spent little time discussing the complex history of the case, the factual underpinnings of the jury's determinations, and the circumstances leading the district court to create a procedure to segregate the lesser claimants and withhold entry of final judgment for damages in favor of any class members pending this interlocutory review. Exxon, however, went further, arguing that if this Court finds that there is no supplemental jurisdiction over the lesser claims, the entire case must begin anew.

Exxon's new argument is not "fairly included" in the question presented. Indeed, it contradicts it. In addition, Exxon's new argument is predicated in large part upon misstatements of the evidentiary and procedural record, requiring a discussion of the circumstances that recently caused the district court to conclude that Exxon's position in this regard is "frivolous."

The Contractual Relationship Between Exxon and its Dealers

The relationship between Exxon and its dealers is governed by uniform sales agreements under which Exxon was entitled to fix the wholesale price of motor fuel. P.Ex. 54. Such "open

price" term contracts for the sale of goods are governed by Uniform Commercial Code § 2-305, enacted in each of the 35 jurisdictions in which Exxon sold motor fuel to its dealers.

Section 2-305 "rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish." U.C.C. § 2-305(2) (Official Cmt. 3). Rather, the seller is required to fix prices "in good faith," defined in both subjective and objective terms as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* (Official Cmt. 4).

Exxon's Discount for Cash Program

Exxon's Discount for Cash Program ("DFC") arose from events immediately following the termination of government-imposed price controls in 1981. After suffering huge losses of volume and market share, Exxon was forced to lower its prices below what it wanted to charge. P.Ex. 21, 55; Doc. 1532 Tr. 1097-1102; Doc. 1535 Tr. 1865-75. Analyzing its loss, Exxon discovered that, vis-à-vis its major competitors, its brand value was weak, its retail chain was aged, and its business was concentrated in unprofitable markets. P.Ex. 55, 67; Doc. 1532 Tr. 1098-1102; Doc. 1535 Tr. 1887-93.

Exxon also observed that, when it raised wholesale prices, its dealers were able to protect their incomes by raising their retail prices, accepting lower sales volumes in the process. That loss of sales volume, however, substantially reduced Exxon's market share and required it to sell its excess fuel at low, "rack" prices, circumstances that cost Exxon over $100 million in a short time. P.Ex. 21, 22, 56.

Exxon decided to accelerate its plans to reduce the size of its dealer network (which it had internally divided into "keepers" and "non-keepers") and at the same time to eliminate its dealers' ability to resist Exxon's wholesale price increases by increasing their retail prices. P.Ex. 22, 26, 32, 34, 35, 53, 55, 56, 59; Doc. 1532 Tr. 1113, 1116; Doc. 1535 Tr. 1868-69.

From this analysis emerged Exxon's DFC program. Exxon calculated that it could increase its profits by $85 million annually at the expense of its dealers if it could persuade them to segment retail prices into a "discounted" cash price and a higher credit price. P.Ex. 23, 24, 26, 28; Doc. 1532 Tr. 1136-60, 1219-21; Doc. 1533 Tr. 1521-35. The source of that additional profit would be a new 3% "credit cost recovery fee" (a price increase with a different label) that Exxon would charge dealers on all credit card sales. *Id.*

Exxon's internal business plan, approved at the highest levels of the company, documented an intent to induce the dealers into altering the economics of their retail pricing practices (which Exxon could not lawfully dictate) by promising that the new fee would be offset with "on average" wholesale price reductions. *Id.* The plan provided that, in the "short term," Exxon would provide the offset; but in the "long term," after the majority of its dealers had segmented their prices, Exxon would secretly "eliminate the short term requirement to reduce the [wholesale price]" and "recoup the offset." P.Ex. 22-26, 28, 47; Doc. 1532 Tr. 1136-60, 1219-21; Doc. 1533 Tr. 1521-35.

Exxon's planning documents recognized that for the plan to be fully effective, at least 75% of the dealers would have to segment their retail prices. *Id.* In that event, the price elasticity of demand of the dealers' retail product offerings would increase, making it impossible for dealers to protect their own profits by taking higher retail margins on lower volumes. P.Ex. 22, 24, 67, 69; Doc. 1532 Tr. 1109-1112; Doc. 1537 Tr. 2645; Doc. 1541 Tr. 3773. This, in turn, would enable Exxon to increase its income at the expense of its "keeper" and "non-keeper" dealers alike, and force its "non-keeper" dealers out of business in denial of their rights under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801 et seq.[3]

3. The PMPA requires oil companies to allow terminated dealers to purchase their stations at fair market value. As Exxon reduced its

(Cont'd)

In August 1982, Exxon rolled out DFC nationwide to its dealers and the public through a highly sophisticated and uniform marketing campaign in which Exxon promised that the new 3% credit cost recovery fee was merely an incentive for dealers to segment prices and would not be a new cost because it would be offset with "on-average" wholesale price reductions. *E.g.*, P.Ex. 29; Doc. 1532 Tr. 1224. The campaign was a success; the overwhelming majority of Exxon dealers were induced into segmenting their retail prices. Doc. 1531 Tr. 942, 946.[4]

Exxon proceeded with its plan, and initially provided the offset in the "short term" by reducing wholesale prices across the board by 1.7 cents per gallon. Consistent with its "long term" plan, in March of 1983 Exxon secretly eliminated the "on average" wholesale price reduction.[5] P.Ex. 2, 5, 5A, 5B, 9, 32, 33, 34, 35, 36, 37; Doc. 1537 Tr. 2684-85, 2693-95, 2738. From that point forward until Exxon terminated DFC in August of

(Cont'd)
dealer network by thousands of stations, the last thing it wanted was competition from its own former dealers in its own former stores. P.Ex. 53; Doc. 1535 Tr. 1876; Doc. 1532 Tr. 1108-09. Exxon therefore attempted to reduce dealer incomes to such an extent that the "non-keeper" dealers would be forced to shut down entirely. *Id.*

4. Exxon's specific and uniform promise that the credit cost recovery fee would be offset with "on-average" wholesale price reductions was proven at trial from Exxon's rollout presentations, videotapes, brochures, dealer newsletters, press releases, the testimony of Exxon officials before Congress, written materials provided to the dealers and to consumer groups, public advertisements, Exxon's interrogatory answers, and the admissions of Exxon's witnesses. P.Ex. 29, 29A, 29B, 30, 39, 40, 71, 72, 156, 170, 282; Doc. 1532 Tr. 1222-28, 1234, 1276-79, 1285-86. In later years, Exxon went so far as to add a specific line item to all dealer invoices purporting to represent the promised "on average" price reduction. P.Ex. 50; Doc. 1533 Tr. 1402.

5. Exxon was able to hide the effective price increase by lagging the market in reducing its prices during a period when oil prices were generally falling. P.Ex. 37; Doc. 1535 Tr. 2051.

1994 (a few days after the class was certified), Exxon failed to provide the promised "on average" wholesale price reduction.[6] P.Ex. 2, 4, 5, 5A, 5B; Doc. 1537 Tr. 2667-2695.

The effect was a reduction in the margins of both "keeper" and "non-keeper" dealers, which facilitated Exxon's reduction of its dealer network from 8,000 to 2,000 dealers with limited exercise of PMPA rights.[7] P.Ex. 18, 59, 79, 84; Doc. 1535 Tr. 1118-19, 1889-90; Doc. 1533 Tr. 1512.

Exxon's Admitted Duty to Provide the Promised "On Average" Wholesale Price Reduction, and the Asserted Measure of its Compliance

Exxon's witnesses all admitted at trial that Exxon would not have been acting "in good faith" if it failed to provide the

6. Exxon kept its dealers in the program by using its National Dealer Advisory Council ("NDAC"), an Exxon-created group of dealer representatives which Exxon's attorney at trial aptly described as being "like a legislature." Doc. 1531 Tr. 923. Exxon used the NDAC to spread to regional dealer groups a carefully orchestrated series of false assurances that Exxon was in fact offsetting credit cost recovery fees with "on average" wholesale price reductions. P.Ex. 73-77, 79-81, 84; Doc. 1532 Tr. 1062-63, 1080, 1223-24, 1240, 1244-45; Doc. 1533 Tr. 1395, 1431-32, 1476, 1486, 1488; Doc. 1535 Tr. 2014-15; Doc. 1537 Tr. 2387-88. The same Exxon representatives simultaneously generated for senior management internal "before DFC" and "after DFC" graphs showing precisely the opposite. P.Ex. 32, 33, 34, 35, 60; Doc. 1535 Tr. 2015-18.

7. In its brief to this Court, Exxon asserts that "Plaintiffs argued that Exxon wanted to 'pick and choose' from among its dealers, *strengthening* the keepers while forcing the demise of the less profitable 'non keepers.'" Exxon Br. at 48 (emphasis added). This is incorrect. Plaintiffs proved at trial that Exxon's duty to provide the promised reduction in wholesale prices was owed and breached as to all dealers, and that all dealers suffered the same per-gallon loss. Indeed, the impact of price segmentation became so severe that Exxon's head of pricing at one point acknowledged that even the "keepers" were being driven out of business. P.Ex. 59.

promised offset, and that Exxon was legally obligated under the sales agreements and the U.C.C. to do so. Doc. 1536 Tr. 2170; Doc. 1540 Tr. 3679-80. The testimony of Exxon's senior vice president of petroleum marketing is illustrative:

> Q. Would you agree with me that it would not be good faith for Exxon to promise its dealers for twelve years that it had provided a price reduction and not provide it?
>
> A. I would agree with that.
>
> * * *
>
> Q. So, is it a legal obligation to provide the offset?
>
> A. It's a statement we made, it's a moral obligation, it's good faith. I think that makes it a legal obligation, yes.

Doc. 1532 Tr. 1087-88; Doc. 1533 Tr. 1537. The senior executive also agreed that the only real issue in the case was whether Exxon had in fact performed the obligation:

> Q. So really, the issue is did you provide it, did you provide the offset?
>
> A. Exactly.

Doc. 1532 Tr. 1179-80.

Plaintiffs' proof of Exxon's breach, and of the fact and amount of damages, was well established. In sworn interrogatory answers and the deposition testimony of its senior pricing personnel and economics expert, Exxon committed to the position that, because it priced in a "dynamic" marketplace, Exxon's performance of its "on average" pricing obligation had to be measured "on average, over time, across all markets." P.Ex. 39, 40, 69; Doc. 1536 Tr. 2170-71; Doc. 1541 Tr. 3769-70. Significantly, Exxon also committed to the position that its compliance with the obligation could be "verified" (Exxon's word) by a statistical analysis of dealer margins, again "on average, over time, across markets." P.Ex. 40, 69; Doc. 1541 Tr. 3773-75. In other words, according to Exxon, its compliance

with the obligation (or breach thereof) had to be tested through an "on average" nationwide analysis of *all* dealer margins, whether within the class or not, such that the proof would be literally identical regardless of whether the class included one, one thousand, or ten thousand dealers.

Plaintiffs' expert witness, a distinguished professor of economics, econometrics, and statistics, performed Exxon's proposed statistical analysis using Exxon's actual wholesale price data and dealer retail price data. His analysis demonstrated a statistically significant decline in average dealer margins within a precise three day period in March of 1983, when Exxon secretly eliminated the promised offset. It also demonstrated that Exxon never reinstated the offset thereafter. P.Ex. 2, 4, 5, 5A, 5B; Doc. 1537 Tr. 2667-79, 2684, 2694-95, 2738.

This statistical evidence was entirely consistent with Exxon's internal business plan, as well as Exxon's internal records showing a wholesale price increase relative to the market during the same three day period in March of 1983. P.Ex. 22-26, 28, 37, 47; Doc. 1532 Tr. 1136-60, 1219-21; Doc. 1533 Tr. 1521-35. It also was consistent with graphs generated for Exxon senior management documenting a consequent increase in Exxon's margins and decrease in dealer margins. P.Ex. 32, 33, 34, 35, 60; Doc. 1535 Tr. 2015-18.

In short, the proof of Exxon's liability and of the damages suffered by the dealers was overwhelming.[8]

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8. At trial, Exxon attempted to demonstrate compliance with its obligation by presenting charts purportedly demonstrating that Exxon's prices were equal to or lower than its competitors' wholesale prices. D.Ex. 11-13, 20-29. Exxon's "proof" vanished, however, when all of its witnesses – including its expert witness – admitted that, because of the antitrust laws and the industry-wide practice of using hidden rebates, discounts, and allowances, Exxon did not know its competitors' actual wholesale prices. P.Ex. 41-46; Doc. 1532 Tr. 1077-78; Doc. 1535 Tr. 1863; Doc. 1541 Tr. 3812, 3819. Exxon's witnesses ultimately were forced to concede that Exxon's purported estimates were useless to set or compare prices. P.Ex. 44; Doc. 1535 Tr. 2025-26; Doc. 1536 Tr. 2120, 2143-44, 2157-58; Doc. 1537 Tr. 2380.

The District Court's Adoption of Procedures to Allow the Elimination of Claimants Based on Possible Trial and Appellate Outcomes

Prior to trial, Exxon asserted a number of defenses which, if successful, would have reduced the number of potential class members entitled to participate in an award of damages. One such defense is raised in the question under review. In furtherance of its class administration duties under Rule 23, the district court fashioned pre-trial, trial, and post-trial procedures to allow for the elimination or reduction of claims if Exxon were to succeed on any of its defenses.

These procedures were facilitated by the fact that Exxon's internal records established with certainty the total amount of credit cost recovery fees collected annually and the number of gallons of motor fuel sold to the dealers during the class period. P.Ex. 1; Doc. 1536 Tr. 2220-21. Using this data, the amount of the "on average" offset was calculated in cents per gallon on an annual basis.[9] *Id.*

With this measure of damages, the district court could eliminate ineligible class members if Exxon prevailed on any of its legal defenses at trial or on appeal, through the simple ministerial exercise of excluding those gallons sold to dealers whose claims are rejected. Through this mechanism, Exxon's liability would be reduced, but the proof necessary to establish Exxon's on-average obligation to all dealers, the breach thereof, or the measure of damages would not be affected. Exxon stipulated to this procedure. Doc. 1179 at 55-56.

The Jury's Special Verdict

The jury returned a special verdict in favor of the Plaintiffs and against Exxon on every disputed factual issue. In particular,

9. For instance, in 1983, Exxon collected $49,693,000 in credit cost recovery fees and sold 3,551,435,000 gallons of motor fuel, creating an "on average" obligation to provide its dealers a 1.4 cents-per-gallon wholesale price reduction. P.Ex. 1; Doc. 1536 Tr. 2220-21 (Exxon's stipulation to the data).

the jury's verdict: (1) found that Exxon had a contractual obligation to provide the "on average" wholesale price reduction and breached that obligation; (2) found clear and convincing evidence that Exxon fraudulently concealed its breach from its dealers; and (3) awarded damages measured in cents per gallon annually. Pet. App. 160a.

Exxon's Invocation of § 1367 to Assert Set Off Counterc'aims Against Absent Class Members

Following the jury's verdict, Exxon sought, and was granted, leave to assert set off counterclaims against individual class members during the claims administration process. Exxon argued that, given the district court's original jurisdiction, § 1367(a) provided a broad grant of supplemental jurisdiction sufficient to cover its proposed counterclaims. It then went on to conclude that supplemental jurisdiction existed, because Fed. R. Civ. P. 13 is not listed among the exclusions to supplemental jurisdiction in diversity cases found in § 1367(b):

> Nor is there any basis in the text of the supplemental jurisdiction statute to suggest that the set-off exception to the requirement of an independent basis of subject matter jurisdiction no longer applies. Thus, the only exceptions to supplemental jurisdiction that are set forth in §1367(b) are specifically limited to [certain] claims . . . under Rule 14, 19, 20, or 24. . . . Neither of these exceptions applies to counterclaims by defendants under Rule 13.

Exxon Reply Memo. Regarding Entitlement to Set Off, at 9 [Doc. 1449].

The District Court's Adoption of a Claims Procedure Which Segregates the Claims Above and Below the Jurisdictional Minimum

After denying Exxon's post-trial motions, the district court entered an order on procedure designed to conclude the case. Pet. App. 95a. That order: (1) entered final judgment solely in

favor of the named Plaintiffs pursuant to Fed. R. Civ. P. 54(b); (2) denied – at Exxon's urging – entry of an aggregate final judgment in favor of the class; (3) ordered implementation of a claims process administered by a special master which required each class member to initiate a claim for recovery based on the jury's cents-per-gallon damage award; (4) required the identification and segregation of lesser claimants; and (5) limited Exxon's objections to ownership of stations, disputes over duration of ownership, and any applicable claims for set off. *Id.* at 143a-156a. The district court also certified for interlocutory review pursuant to 28 U.S.C. § 1292(b) the jury's verdict, the final judgment in favor of the named Plaintiffs, the decision not to enter an aggregate final judgment for the class, the intended claims administration process, and, finally, the Court's subject matter jurisdiction over the lesser claimants. *Id.*

Interlocutory Appellate Proceedings

The Eleventh Circuit granted interlocutory review, and on June 11, 2003, a panel of the Eleventh Circuit affirmed the district court's rulings across the board. Pet. App. 67a. Exxon then sought rehearing *en banc* on the issues of class certification and supplemental jurisdiction over the lesser class members. That request was denied on March 15, 2004, with two circuit judges filing a lengthy dissent solely on the issue of supplemental jurisdiction over the lesser claimants. Pet. App. 1a.

Exxon's subsequent petition for a writ of certiorari was denied in part and granted in part on October 12, 2004. J.A.9. The Court declined review of Exxon's challenge to the propriety of class certification, in which Exxon contended that its liability and damages to individual class members had improperly been established using average pricing data (an argument Exxon nonetheless persists in making here). *Id.* The Court accepted review of the narrow question of whether § 1367 overrules the outcome of *Zahn*.

SUMMARY OF ARGUMENT

In a reasoned decision aligning the Eleventh Circuit with the majority of other circuits to have considered the issue, a panel of the court (Judges Wilson, Fay, and Goldberg) held that § 1367 overrules the outcome of *Zahn*. This decision should be affirmed.

Section 1367 is clear. On its face, § 1367(a) provides federal courts which have original jurisdiction over one or more claims with supplemental jurisdiction over any other claim that forms part of the same case or controversy, unless such other claims are barred by §1367(b) or subject to discretionary declination under § 1367(c). Neither (b) nor (c) are applicable in this circumstance. Accordingly, because the district court has original jurisdiction over the named Plaintiffs' claims, it also has supplemental jurisdiction over the lesser claims.

Exxon incorrectly argues that, in diversity cases, each absent party or class member must establish an independent basis for original jurisdiction in order to be entitled to supplemental jurisdiction. Exxon's interpretation would effectively read § 1367(a) out of the books in diversity cases, and would obviate any need for § 1367(b), which provides specific limitations in diversity cases. It would also require § 1367(a)'s use of the term "civil action" to be construed differently in federal question cases than in diversity cases.

Exxon's argument that § 1367 cannot be given the plain reading accorded it below because original jurisdiction over a diversity-based class action is "destroyed" by the inclusion of lesser claimants is equally without merit. The notion that Congress would have countenanced this result – the destruction of original jurisdiction upon the exercise of supplemental jurisdiction – is absurd. Jurisdiction, "the power to decide a justiciable controversy," is not lost over justiciable claims meeting the jurisdictional minimum merely because of the inclusion of lesser claims.

In suggesting otherwise, Exxon conflates the historical difference between treatment of defects in *diversity of citizenship* (which is not implicated in this case) and the failure of some claimants to establish the requisite *jurisdictional minimum* (which is implicated both in *Exxon* and *Ortega*). No reported decision has ever held that the failure of some claimants to establish the requisite jurisdictional minimum results in the "destruction" of jurisdiction. Rather, as Exxon itself observed in its petition, under long-standing precedent of this Court, any claimant who does not meet the jurisdictional minimum (and is not otherwise entitled to supplemental jurisdiction) must simply "be dismissed from the case."

Exxon also advances the peculiar suggestion that § 1367 does not apply to class actions brought pursuant to Rule 23. It does. Section 1367 provides a sweeping grant of supplemental jurisdiction in "any civil action," except where provided otherwise, and class actions brought pursuant to Rule 23 are prominently *not* included in the "otherwise" category.

Exxon's argument that the majority view regarding the proper interpretation of § 1367 cannot be correct because it would inevitably lead to the abrogation of the statutory doctrine of complete diversity of citizenship raises issues not directly implicated in either of the consolidated appeals. It is also misguided. Federal courts have judicially eroded the doctrine of complete diversity in numerous decisions without Congressional authorization. In adopting § 1367, Congress codified those decisions. It cannot be correct that Congress, in adopting a statute ratifying the erosion of the complete diversity doctrine, believed that it lacked the power to further erode the doctrine. Congress unquestionably has the power to do so if it chooses. And, in § 1367, it did so.

Exxon's tortured reading of the plain language of § 1367 is equally unaided by its resort to the statute's legislative history. As an initial matter, where, as here, the statute under review is

clear and unambiguous, Congress is presumed to have said what it meant and meant what it said, rendering resort to legislative history improper. In this case, however, even if the Court were to examine the statute's history, the outcome would be the same.

At the time they wrote what would eventually become the final language of § 1367, the drafters of the text expressly stated that their words were intended to overrule *Zahn*. By contrast, what Exxon characterizes as "conclusive legislative history" was planted in the statute's House Report by staff consultants, in what they have admitted was an attempt to provide a "history" that would contradict the statute itself.

Exxon also substantially overstates the significance of Congress' decision to overturn the outcome of *Zahn*. Although a majority of the courts of appeals have concluded that class actions brought by named plaintiffs who meet the jurisdictional minimum may include absent class members who do not, plaintiffs continue to file large, multi-state class actions in *state* courts, framing their complaints in a manner to avoid the possibility of removal. Indeed, it is precisely for this reason that Exxon and many other large multi-national companies have lobbied Congress to federalize all significant multi-state class actions.

Finally, the question presented for review does not "fairly include" Exxon's new theory that, if the Court answers the question presented in the negative, the case must begin anew. Therefore, it should not be considered, although the result would be the same even if it were.

Because Exxon's self-created "on-average" obligation required it to perform – in Exxon's own words – "on average, over time, and across markets," the proof of Exxon's breach and the damages suffered by the class would be exactly the same if the case were to be retried without the lesser claimants. That is, the evidence of what the lesser claimants paid and received would still be included in the data used to determine performance of the obligation "on average, over time, and across markets."

Indeed, when this argument was recently presented to the district court in connection with Exxon's request for a stay pending this Court's decision, the district court expressly ruled that Exxon's purported claim of prejudice is "frivolous," and that "the manner in which [Exxon's certiorari] question is posed answers the question, which is that those who don't meet the supplemental jurisdiction requirements would be out and everybody else would be in." Tr., Hearing on Exxon's Motion for Stay Pending Supreme Court Review, Jan. 7, 2005, Doc. 1778 at 38.

Moreover, this class action is unusual in that Exxon's duty was found by the jury to be owed to all dealers collectively. Thus, it is appropriate to conclude that the amount in controversy in this civil action is the total amount taken from all dealers. The district court's conclusion that aggregation is not allowed because of the absence of a "res" was error, the correction of which provides an alternative ground to affirm the outcome of these proceedings.

In short, even were the Court to conclude that the answer to the question accepted for review is "no," there is no conceivable justification for setting aside fourteen years of judicial labor on behalf of the thousands of class members who indisputably meet the jurisdictional minimum, simply because of the inclusion of lesser claimants.

ARGUMENT

1. Section 1367(a) Authorizes Federal Courts with Original Jurisdiction to Exercise Supplemental Jurisdiction over Absent Class Members Who Do Not Meet the Jurisdictional Minimum

The Eleventh Circuit, consistent with the majority of the courts of appeals,[10] correctly concluded that the plain language of § 1367 provides supplemental jurisdiction over absent class members whose claims do not satisfy the amount-in-controversy requirement of § 1332.

In addressing whether supplemental jurisdiction extends to class members who do not independently establish the jurisdictional minimum, the Eleventh Circuit properly began by "examining the text of the statute," presuming "that a legislature says in a statute what it means." Pet. App. at 73a. Section 1367(a) provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within the original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such

10. *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004) (Cudahy, J.); *Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001) (Wilkinson, C.J.); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001) (Fletcher, J.); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997) (Posner, C.J.); *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995) (Higginbotham, J.); *accord* 13B Charles Alan Wright, et al., *Federal Practice and Procedure* § 3567.2 (Supp. 2004) ("The better approach is to interpret the statute as having overruled *Zahn* . . ."); Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 Emory L.J. 55, 69 (2004).

> supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

This subsection thus provides a broad grant of jurisdiction over any claim which forms part of the same case or controversy as a claim within the court's original jurisdiction.

In this case, "the parties agree that the district court had original jurisdiction over the class representatives' claims, because they satisfied the $50,000 jurisdictional minimum amount in controversy requirement." Pet. App. at 75a. Thus, because the lesser claims unquestionably form part of the same case or controversy, *id.*, the court "shall have supplemental jurisdiction" over them. 28 U.S.C. § 1367(a).

This does not end the inquiry. It is next necessary to determine if § 1367(b) precludes the exercise of supplemental jurisdiction over these claims. It does not:

> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

Section 1367(b) does not exclude claims by Rule 23 class members, and where Congress "explicitly enumerates certain exceptions" to a general grant of power or prohibition, "additional exceptions are not to be implied." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 615-17 (1980).

Accordingly, because supplemental jurisdiction over the lesser claimants is granted by § 1367(a) and is not withdrawn in § 1367(b), there is supplemental jurisdiction over them.

Pet. App. at 76a; *accord Olden*, 383 F.3d at 506-07; *Rosmer*, 263 F.3d at 117; *Gibson*, 261 F.3d at 938; *In re Abbott Labs.*, 51 F.3d at 528-29.

2. Section 1367 Must Be Interpreted to Provide that Supplemental Jurisdiction Exists in Diversity Cases

Exxon concedes that Congress would never have enacted a statute providing a grant of supplemental jurisdiction which, upon its exercise, would cause the basis for that jurisdiction to disappear.[11] That concession should end the discussion, because an "interpretation" of the statute leading to such an absurd consequence – such as Exxon's "interpretation" here – is not sustainable.

a. Requiring Original Jurisdiction Over Claims For Which Supplemental Jurisdiction is Sought Would Render Supplemental Jurisdiction Meaningless

To avoid the catch-22 of losing jurisdiction when receiving it, Exxon argues that the statute should be interpreted so that only those who have an independent basis for original jurisdiction in the first instance are entitled to enjoy supplemental jurisdiction. Of course, that assertion is itself absurd. As the Eleventh Circuit aptly stated in rejecting this argument:

> Exxon argues that "the text and structure of § 1367 preserve the jurisdictional requirement of *Zahn*." In so arguing, however, it essentially asks us to construe § 1367 in such a way as to apply only where the court already has original jurisdiction over every class members' claim. We do not believe that the statute can be read to suggest

11. Specifically, Exxon argues that "Section 1367 cannot logically be interpreted to provide that the addition of a party simultaneously authorizes supplemental jurisdiction *and* eliminates the original diversity jurisdiction on which that supplemental jurisdiction must be based." Exxon Br. at 3 (emphasis in original). Although Exxon's choice of words is odd, as it is not "the addition of a party" that "authorizes" supplemental jurisdiction, Exxon's statement recognizes a basic principle that undercuts its own argument.

> this. If a district court is required to have original jurisdiction over every class members' claim, the last sentence of § 1367(a), providing that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of *additional parties*" would be superfluous. 28 U.S.C. § 1367(a) (emphasis added). There would be little reason for the statute to provide for the exercise of claims involving the joinder of additional parties if the district court first were required to have original jurisdiction over those claims. We therefore cannot read the statute in this way.

Pet. App. at 74a n.5 (citation omitted).

This Court reached the same conclusion in *City of Chicago*, a case applying § 1367 in the context of federal question jurisdiction:

> ICS' proposed approach – that we first determine whether its state claims constitute "civil actions" within a district court's "original jurisdiction" – would effectively read the supplemental jurisdiction statute out of the books. *The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking.*

City of Chicago v. International College of Surgeons, 522 U.S. 156, 167 (1997) (emphasis added).

Section 1367 establishes supplemental jurisdiction in federal question and diversity cases. If Congress intended to limit supplemental jurisdiction to federal question cases only, it would have said so, and would not have included subsection (b) at all. Instead, it provided a broad grant of supplemental jurisdiction in diversity cases in subsection (a), subject only to the limitations of subsection (b).

Needless to say, it is not appropriate to adopt an interpretation of a statute that would render its terms superfluous. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (recognizing well established principle that, in interpreting a statute, it is the court's "duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section"); *Heckler v. Chaney*, 470 U.S. 821, 829 (1985) (same). As Chief Judge Wilkinson stated in *Rosmer* in rejecting the same argument: "[T]he text of § 1367 makes clear that 'original jurisdiction' in § 1367(a) includes diversity cases. If it were otherwise, . . . there would be absolutely no need for § 1367(b) at all since § 1367(b) only applies to cases brought under 28 U.S.C. § 1332." *Rosmer*, 263 F.3d at 115.

b. Original Jurisdiction is Not "Destroyed" Upon the Exercise of Supplemental Jurisdiction

The cornerstone of Exxon's entire argument is the notion that § 1367 cannot be read to bestow supplemental jurisdiction in a diversity case because the district court's original jurisdiction would be "destroyed" by the inclusion of the lesser claimants. This assertion, presented as a bedrock principle of law, is not supported by a single case in the annals of federal jurisprudence. Moreover, the notion that Congress would have enacted a statute providing a grant of supplemental jurisdiction which cannot be exercised without destroying it reflects a lack of appreciation for the exclusive power of Congress to determine the scope of federal jurisdiction. Even if a concept of destroyed jurisdiction had existed in jurisdictional amount cases (which it did not), this doctrine could not have survived the adoption of § 1367, which "explicitly confers" supplemental jurisdiction in such cases.

It has long been understood that "[j]urisdiction is the power to decide a justiciable controversy." *Moore v. New York Cotton Exch.*, 270 U.S. 593, 608 (1926) (quoting *Binderup v. Pathé Exch.*, 263 U.S. 291, 305 (1923)). Once established, that "power to decide" – by its very nature – is not lost merely by virtue of the presence or addition of other non-justiciable claims. *See, e.g., Zahn v. International Paper Co.*, 414 U.S. 291, 295-296, 301 (1973); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588-90 (1939).

In suggesting otherwise, Exxon attempts to confuse the distinction between defects in *complete diversity of citizenship* (not implicated here) with the failure of some claimants to independently establish the requisite *jurisdictional minimum* (implicated in both this case and *Ortega*). Whereas this Court has described the absence of complete diversity of citizenship as having "destroyed" original jurisdiction (a defect which may also be cured),[12] no reported decision has ever held that the failure of one or more claimants to satisfy the amount in controversy requirement results in the "destruction" of jurisdiction for those that do. To the contrary, the rule is exactly the opposite: § 1332 does not require dismissal of the entire action upon a determination that a claimant falls short of the jurisdictional minimum, but rather only "requires dismissal of those litigants whose claims do not satisfy the jurisdictional amount." *Zahn*, 414 U.S. at 295-296; *Clark*, 306 U.S. at 588-90; *Grosjean v. American Press Co.*, 297 U.S. 233, 241-42 (1936); *Walter v. Northeastern*, 147 U.S. 370, 373 (1893); *Stewart v. Dunham*, 115 U.S. 61, 65 (1885); *Inhabitants of the Township of Bernards v. Stebbins*, 109 U.S. 341, 356 (1883); *Rich v. Lambert*, 53 U.S. (12 How.) 347, 352-53 (1851).

In fact, Exxon itself recognized this principle in its petition, which stated that:

> [T]he issue is whether § 1367 legislatively overrules this Court's decision in *Zahn*, holding that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and *any plaintiff who does not must be dismissed from the case. . . .*"

Exxon Pet. at 10 (quoting *Zahn*, 414 U.S. at 301) (emphasis added).[13]

12. As this Court stated in *Newman-Green*, in affirming the post-judgment appellate dismissal of a non-diverse party:

> [T]he weight of authority favors the view that appellate courts possess[] the authority to grant motions to dismiss dispensable nondiverse parties. . . . We decline to disturb that deeply rooted understanding of appellate power, particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.

Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 836 (1989).

In *Finley v. United States*, 490 U.S. 545 (1989), this Court clearly stated that there would be no further transgressions from the Constitutional requirement that federal jurisdiction be "explicitly conferred." *Id.* at 556. The Court additionally stated that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress." *Id.* This principle applies when Congress has failed to "explicitly confer" jurisdiction. It applies just as forcefully when Congress *has* "explicitly conferred" jurisdiction. Judicial decisions based on a contrary view of public policy cannot override Congress' explicit expression.

Simply put, the district court's "power to decide" the jurisdictionally-sufficient claims of the named Plaintiffs and the larger class claimants is not lost by virtue of the mere presence of the lesser claimants or their claims.

c. Exxon's Alternative "Interpretation" Is an Improper Attempt to Deny the Exercise of Supplemental Jurisdiction in Diversity Cases

An interpretation of § 1367 must begin and end with an explanation of the circumstances that would allow a party to qualify for its exercise. Exxon's argument, which begins and ends with the notion that the words must be read to preclude jurisdiction because its exercise would cause its loss, is not an "interpretation" – it is an entreaty to obtain judicial nullification.

Exxon's argument centers on § 1367(a)'s requirement that there be original jurisdiction over a "civil action." Exxon argues that the use of the term "civil action" (instead of "claim")

13. In a related context, the Court has observed that named plaintiffs are free to proceed on their individual claims following a denial of class certification, for it does not terminate the litigation. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

requires that *every* claim included within the lawsuit must independently meet the requirements for original jurisdiction. In short, according to Exxon, the district court could never have original jurisdiction over a civil action that included supplemental parties and, therefore, could never have the original jurisdiction necessary to confer supplemental jurisdiction.

Exxon's attempt to interpret the words "civil action" to render § 1367 meaningless in diversity cases depends on a mutually exclusive use of the same words in this statute and other jurisdictional statutes, and contradicts the decisions of this Court in *Finley* and *City of Chicago*.

Section 1332 requires that, in a "civil action," the amount in controversy must exceed the established minimum. *Zahn*, which was decided before supplemental jurisdiction was "explicitly conferred" by statute, concluded that the jurisdictional minimum for a "civil action" must be established by each plaintiff and each absent class member on a claim by claim basis. *Zahn*, 414 U.S. at 301. In § 1367, Congress' use of the same words, "civil action," cannot be read to require a different outcome.

Exxon's argument would also require "civil action" to mean something different in a diversity case than in a federal question case. In *City of Chicago*, the Court clarified that the term "civil action" means the opposite of what Exxon argues it means here. *City of Chicago*, 522 U.S. at 167. This Court, and other federal courts, have rejected similar attempts to interpret the same words in the same statute to mean different things. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) ("[It is a] basic canon of statutory construction that identical terms within an Act bear the same meaning."); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Rosmer*, 263 F.3d at 115-16; *Gibson*, 261 F.3d at 935-36. To paraphrase the dissent in *Ortega*, it is one thing to define the same term in two different statutes differently, it is quite another to interpret the same term in one

statute two different ways. *Ortega v. Star-Kist Foods*, 370 F.3d 124, 147 (1st Cir. 2004) (Torruella, J., dissenting).

Finley considered a similar argument concerning the distinction – or lack thereof – between the terms "civil action" and "claim." The issue was whether, in changing the Federal Tort Claims Act's jurisdictional provision to read "civil actions on claims against the United States" (it had previously read only "claims against the United States"), Congress intended to alter the scope of jurisdiction conveyed under the statute. In examining this issue, the Court observed that:

> [R]elatively soon after the adoption of the Federal Rules of Civil Procedure, which provide that "[t]here shall be one form of action to be known as 'civil action'" . . . . [Congress] inserted the expression "civil action" throughout the provisions governing district-court jurisdiction.

Finley, 490 U.S. at 554-55 (second alteration in original). Congress' intent was to achieve consistency. *Id.* (citing H.R. Rep. No. 308, 80th Cong., 1st Sess., App. A114-A125 (1947)). Thus, finding the term "civil action" to be merely "stylistic," and not substantive, the Court concluded that Congress did not intend to alter the scope of jurisdiction conveyed under the statute. *Id.*

The same result follows here. There is simply no basis in the text of § 1367 or otherwise to construe the term "civil action" differently in federal question and diversity cases, let alone to conclude that the statute was not intended to apply to diversity cases *at all*. The statute provides otherwise.

3. Section 1367 Applies to Class Actions

Exxon advances the peculiar suggestion that because § 1367(a) does not specifically reference Rule 23, it does not apply to class actions. Exxon also cites to § 1367(a)'s second sentence – "Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties" – as "evidence" that Congress intended to exclude from the statute

claims that do *not* involve "the joinder or intervention of additional parties," such as claims by absent class members. These arguments are makeweight.

On its face, Section 1367 provides a sweeping grant of supplemental jurisdiction "in any civil action" except as provided in subsection (b) or (c). Thus, the operative question is *not* – as Exxon submits – whether Rule 23 is mentioned in subsection (a), but whether it is listed among the exceptions found in (b) or (c). It is not.[14]

Likewise, nothing in § 1367 can be read to suggest that § 1367(a)'s first sentence was intended to be consumed by its second. The first sentence provides that, "in any civil action" in which the district court has original jurisdiction, the courts shall have supplemental jurisdiction over "all other claims" that form part of the same case or controversy. The second sentence merely clarifies that "all other claims" was intended to include claims that "involve the joinder or intervention of additional parties" – the "pendent party" claims that *Finley* had precluded. In other words, the second sentence is illustrative, not exhaustive.

Indeed, were Exxon's arguments in this regard correct, § 1367(a) would not even extend to counterclaims, as Rule 13 is not mentioned either, and counterclaims brought pursuant to Rule 13 do not "involve the joinder or intervention of additional parties." Yet, § 1367(a) clearly *does* extend to counterclaims, as Exxon correctly observed when it successfully sought leave to assert its set-off counterclaims.

4. Concerns about *Strawbridge* Are Not Implicated by this Case and Are Premised on a Belief That this Court Did Not Mean What it Said in *Finley*

Exxon further argues that the majority view regarding the proper interpretation of § 1367 cannot be correct because it would inevitably lead to the abrogation of the doctrine of

14. 28 U.S.C. §§ 1331 and 1332, of course, also do not mention Rule 23, yet provide jurisdiction in federal question or diversity-based class actions brought pursuant to Rule 23.

complete diversity of citizenship embodied in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), *overruled in part on other grounds by Louisville, Cincinnati, & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1894). This argument is irrelevant to these consolidated appeals.

As an initial matter, *Strawbridge* addressed only the first of the two statutory requirements for original diversity jurisdiction, complete diversity of citizenship, which is not at issue in either of the consolidated appeals. Throughout the history of federal jurisprudence, the complete diversity requirement has always been treated differently than the amount in controversy requirement. Hence, the outcome of this case should have no legal effect on the relationship between § 1367 and the requirement of complete diversity. In other words, Exxon's argument, at best, amounts to a "look around the corner," and any discussion thereof simply previews the kind of debate the Court might hear in a case properly raising the issue.

We see the application of § 1367 to the original concept of complete diversity differently than the other litigants in this consolidated proceeding. In our view, a judicial adoption of one or more of the inventive interpretations of § 1367 offered to avoid the plain language of the statute – which "explicitly confers" supplemental jurisdiction even on non-diverse plaintiffs – would be a *rejection* of the true holding in *Strawbridge* and a return to the days when it was believed that federal courts could properly establish the scope of their own jurisdiction.

This Court should recognize that § 1367 is *not* an "absurd" encroachment upon the requirement of complete diversity of citizenship. Rather, it is an explicit codification of some of the prior judicial decisions expanding the scope of federal jurisdiction, a rejection of others, and an alteration of the scope of federal jurisdiction in ways that had not originated with the

courts – such as the plain language permitting non-diverse plaintiffs to join civil actions.[15]

a. Post-*Strawbridge*, the Statutory Requirement of Complete Diversity of Citizenship Was Significantly Eroded by the Courts

Exxon's argument about the sanctity of *Strawbridge* misidentifies the source of the doctrine of complete diversity of citizenship, overstates its reach, and ignores the power of Congress to alter it. The doctrine of complete diversity of citizenship originated in the Judiciary Act of 1789, not, as Exxon would have it, in this Court's opinion in *Strawbridge*. This Court, in *Strawbridge*, simply acknowledged the power of Congress to make such a decision, even where the grant of jurisdiction was less than that permitted by Article III. *Strawbridge*, 7 U.S. (3 Cranch) at 267. As reiterated 185 years later in *Finley*:

> The Constitution must have given to the court the capacity to take [judicial power], *and an act of Congress must have supplied it*. . . . To the extent that such action is not taken, the power lies dormant.

Finley, 490 U.S. at 548 (emphasis in original; internal quotation omitted).

Between the book-ends of *Strawbridge* and *Finley* are numerous decisions regarding the scope of federal jurisdiction, not all of which have been faithful to the Constitutional supremacy of Congress in this arena. *Strawbridge*, which came at the beginning, was written on a clean slate. *Finley*, by contrast,

15. In the fourteen years since § 1367 was adopted, there has been no flood of litigation involving the joinder of non-diverse plaintiffs. No such case has even reached the point of appellate consideration. In any event, in § 1367(c), Congress gave to district courts broad discretion to decline the exercise of supplemental jurisdiction where it appears that the court's original jurisdiction is being used as a device to bring in cases in which non-diverse claims predominate. *See City of Chicago*, 522 U.S. at 174 (remanding to district court to determine if state law claims should be dismissed pursuant to § 1367(c)).

was written on a slate full of what the *Finley* Court described as "cases [that] do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred." *Id.* at 556.

The inconsistent approach with respect to the necessity that jurisdiction be "explicitly conferred" has been noticeable in decisions permitting defendants to join non-diverse parties and in decisions establishing pendent and ancillary jurisdiction. Without any meaningful Congressional alteration of the diversity statute, federal courts have allowed, under the rubric of pendent and ancillary jurisdiction: plaintiffs' assertions of pendent non-diverse state law claims; defendants' joinder of non-diverse parties; defendants' assertion of non-diverse state law counterclaims; third-party defendants' non-diverse state law claims; and intervention of non-diverse parties. *See, e.g, United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724-27 (1966); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 & n. 18 (1978) (collecting cases).

Finley was not the first of this Court's post-*Strawbridge* decisions to acknowledge Congressional supremacy over federal jurisdiction. Nor was it the first to attempt to draw the line on incursions into Congress' prerogatives in this area. *Finley* was unique for the clarity with which it conveyed the message that federal jurisdiction must be "explicitly conferred." It not only placed squarely before Congress the question of whether pendent party jurisdiction was a desirable extension of existing law, it also placed before Congress the concern that, absent specific Congressional authority, other well-entrenched and valued judicial enlargements of jurisdiction – including some that had eroded the doctrine of complete diversity of citizenship – were in jeopardy.[16]

16. This concern was expressed in the report of the Congressionally-created Federal Courts Study Committee's Subcommittee, which recognized that *Finley* would appear to preclude federal courts from exercising forms of what is now known

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b. Post-*Finley*, Congress Codified Some, but Not All, of These Judicial Incursions, and Exercised its Prerogative to Go Further

In *Finley*'s wake, after two centuries of decidedly modest legislative activity regarding the scope of federal jurisdiction, Congress adopted a statute, 28 U.S.C. § 1367, that expanded the existing statutory grant of federal jurisdiction in significant ways.

Congress could have confined the statute to the specific issue of pendent party jurisdiction in federal question cases. Instead, it chose to assert its Constitutional power – underscored in *Strawbridge* and *Finley* – to establish a new across-the-board regime for the exercise of pendent and ancillary jurisdiction in both federal question and diversity jurisdiction actions, which it titled "supplemental jurisdiction." *See City of Chicago*, 522 U.S. at 165 ("Congress has codified those principles in the supplemental jurisdiction statute, which combines the doctrines of pendent and ancillary jurisdiction under a common heading.").

The resulting statute – § 1367 – represents a conscious Congressional effort to codify most, and reject some, of the judicial expansions of federal jurisdiction that were established during the preceding 200 years. The outcome of *Gibbs* is embraced, both with respect to the exercise of pendent and ancillary jurisdiction, and, most importantly, through the codification in § 1367(c) of district court discretion to decline such jurisdiction (discretion that, properly exercised, will avoid the misuse of diversity jurisdiction Exxon and others predict). *Gibbs*, 383 U.S. at 725-27. The outcomes in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), and the numerous prior decisions permitting defendants to join non-diverse parties, are similarly embraced. By contrast, other prior judicial

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as supplemental jurisdiction where "none of the existing jurisdictional statutes expressly confers such authority." 1 Fed. Cts. Study Comm., Working Papers & Subcomm. Reports (July 1, 1990), 547, 554.

outcomes affecting the scope of pendent and ancillary jurisdiction, including that reflected in *Zahn*, were rejected.[17]

No one can seriously deny that Congress approved prior judicial encroachments on the doctrine of complete diversity of citizenship in adopting § 1367. It therefore cannot seriously be argued that Congress lacked (or believed it lacked) the power to do more of the same. Yet, that is precisely the argument Exxon and others advance to ignore the plain reading of the statute which "explicitly conferred" supplemental jurisdiction.

Since *Finley*, this Court has scrupulously followed the plain language of § 1367, recognizing the power of Congress to establish and alter the scope of federal jurisdiction. *City of Chicago*, 522 U.S. at 167. These consolidated cases present a similar opportunity to hold the line against a return to the days when federal courts embarked on the path of public policy driven decision-making. The most significant opportunity to establish that the jurisdictional slate is once again clean (and firmly in Congressional control) will not arrive, however, until the *Strawbridge* issue properly reaches this Court.

It is no longer necessary or even possible for this Court to rely on Congressional acquiescence to prior judicial extensions or limitations on the scope of federal jurisdiction. Congress has spoken,[18] and the tortured interpretations offered to take this Court back to pre-*Finley* days should be rejected.

17. It is frequently asserted that § 1367 "adopted" *Gibbs* and "overruled" *Finley*. This statement ignores the holding in both decisions concerning the necessity that judicial power be explicitly conferred. In enacting § 1367, Congress did not "adopt" or approve the *Gibbs* Court's view that federal courts have the power to shape the scope and limits of federal jurisdiction. It simply adopted the *outcome* in *Gibbs* long after the fact. Similarly, Congress' adoption of § 1367 did not "overrule" *Finley*, but simply exercised the legislative power that *Finley* had recognized as superior and exclusive.

18. The wisdom of deference to Congress on issues affecting the scope of federal jurisdiction is clear. A legislative process, being by

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5. Resort to Legislative History Is Improper Because § 1367 Is Clear and Unambiguous

Exxon ignores the critical bridge which must be crossed before resorting to legislative history:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *accord Bedroc Ltd. v. United States*, 541 U.S. 176, 124 S. Ct. 1587, 1593, 1595 & n.8 (2004); *Desert Palace Inc. v. Costa*, 539 U.S. 90, 98 (2003).

This Court has authorized departure from this settled rule of interpretation only "in rare and exceptional circumstances," *Garcia v. United States*, 469 U.S. 70, 75 (1984) (internal quotations omitted), and "only [upon] the most extraordinary showing of contrary intentions" in the legislative history. *Id.*; *see also Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 580-81 (1982).

(Cont'd)

definition political rather than judicial, includes the entire nation through its elected representatives participating in decisions regarding issues that will affect every district court and every litigant. If a citizen like Exxon believes the outcome of the legislative process is undesirable public policy, the remedy is not judicial but legislative – in short, go see your Congressman. By contrast, the judicial process requires focus on particular cases and controversies, which necessarily limits the debate. Arguments such as Exxon's improperly seek an antidote for unhappiness with legislation though judicial decision (in this case, *dicta*).

In this regard, the Court has recognized that mere inconsistencies between a statute's language and its legislative history do not constitute the requisite extraordinary showing of contrary intentions. In *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994), for instance, this Court declined to interpret a statute granting a regulatory exemption for the "treating, storing, disposing of, or otherwise managing" hazardous wastes as extending to the "generation" of hazardous wastes, despite a contrary statement in the Senate Committee Report that the exclusion would include "'all waste management activities of such a facility, including the *generation* . . . of waste.'" *Id.* at 336-37. In reaching this conclusion, the Court observed that "it is the statute, and not the Committee Report, which is the authoritative expression of the law." *Id.* at 337. The Court also noted its agreement with the court of appeals, which had remarked: "Why should we . . . rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't." *Id.*

Moreover, the Court has on several occasions noted that faithfulness to a statute's plain text is especially important when interpreting a statute affecting jurisdiction. *Bread Political Action Comm.*, 455 U.S. at 580-81 ("Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes[.]'") (quoting *Palmore v. United States*, 411 U.S. 389, 396 (1973)). This is, of course, because it is for Congress to specify the boundaries of federal jurisdiction, which the courts must honor precisely – no more, and no less.

Section 1367's text is clear and unambiguous. Hence, it provides no justification whatsoever for sifting through the waste bins of the legislative process to ascertain meaning. Ironically, however, if this Court were to indulge Exxon's request to examine the legislative history, it would find that the legislature intended to overrule *Zahn*.

6. The Legislative History Establishes That the Statute's Drafters Intended to Overrule *Zahn* and That the Contrary "History" is Not Legitimate

a. The Origins of the Statutory Text

In 1989, Congress passed the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988), which created the Federal Courts Study Committee ("FCSC"), an *ad hoc* group made up of members of Congress, members of the federal and state judiciary, and public and private practitioners. The FCSC was instructed to examine problems and issues facing the federal courts, and to recommend necessary changes in the law. *Id.*

The FCSC, in turn, formed a five member subcommittee ("FCSC Subcommittee") charged with examining the role of the federal courts. Congressman Robert Kastenmeier of Wisconsin was a member. Among the issues the FCSC Subcommittee addressed was what would eventually become known as "supplemental jurisdiction."

(i) The FCSC Subcommittee Proposes a Statute Expressly Intended to Overrule *Zahn*

In March of 1990, the FCSC Subcommittee issued a lengthy report discussing this Court's then-recent decision in *Finley*, and recommending that Congress codify the doctrines of pendent and ancillary jurisdiction in a comprehensive supplemental jurisdiction statute which would, among other things, overrule *Zahn*. 1 Fed. Cts. Study Comm., Working Papers & Subcomm. Reports (July 1, 1990), at 547, 560-61 & n.33. In particular, although the FCSC Subcommittee generally wanted to limit the expansion of diversity jurisdiction, it did not view *Zahn* to be a sensible limitation, and made clear in its report and proposed statute that its intent was to set *Zahn* aside:

> [O]ur proposal would overrule the Supreme Court's decision in *Zahn*. . . . From a policy standpoint, this decision makes little sense, and we therefore recommend that Congress overrule it.

Id. at 561 n. 33.

The following month, the full FCSC released its report making general recommendations on over 100 issues regarding the operations of the federal courts. Report of the Fed. Cts. Study Comm. (April 2, 1990). The FCSC also made reference to a general desire to limit the scope of diversity jurisdiction and recommended the adoption of a supplemental jurisdiction statute, but did not comment on its Subcommittee's recommendation to abrogate *Zahn*, and did not propose a specific statute. *Id.*

(ii) The House Judiciary Committee's Subcommittee on Courts Recommends Adoption of the Proposed Statute Drafted to Overrule *Zahn*

In July of 1990, several of the FCSC's recommendations made their way to the House of Representatives in the form of proposed legislation sponsored by Congressman Kastenmeier. *See* H.R. 5381, 101st Cong. (1990). The bill was referred to the House Judiciary Committee's Subcommittee on Courts, which was chaired by Congressman Kastenmeier.

Relative to the FCSC Subcommittee's proposal, the initial version of the proposed bill provided a far *broader* grant of supplemental jurisdiction. H.R. 5381, § 120. Specifically, the bill not only overruled the outcome in *Zahn*, but went further to overrule the outcome in *Kroger*. *Id.*; Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. at 28-32 (1990).

Before the bill was presented for debate before the House Judiciary Committee's Subcommittee on Courts, a group of three House Judiciary Committee consultants (law professors Thomas Rowe, Stephen Burbank, and Thomas Mengler) became concerned that the grant of supplemental jurisdiction under

consideration by the House Subcommittee was too broad, particularly because it would – as then drafted – overrule *Kroger*. The professors then corresponded with past FCSC Chairman Judge Joseph Weis (who while serving in that capacity had voiced opposition to diversity jurisdiction), and encouraged Judge Weis to advocate adoption of the form of the statute earlier presented by the FCSC Subcommittee (the proposed statute written to overrule *Zahn*, but not *Kroger*). *Id.* at 701-18 (letters to Judge Weis).

Judge Weis agreed and presented a statement at the House Subcommittee hearing on September 6, 1990, objecting to H.R. 5381, § 120 as being too great an extension of diversity jurisdiction. He mentioned his belief in the need to preserve the outcome in *Kroger*, and recommended that the language of the FCSC Subcommittee's proposed statute be utilized instead. *Id.* at 96-98 (prepared statement of Judge Weis).[19]

Congressman Kastenmeier's House Subcommittee accepted this recommendation and replaced H.R. 5381, § 120 with the proposed statute written to overrule *Zahn* (with minor alterations not relevant here). *Id.* at 722.

(iii) Three Consultants Plant "History" They Knew to Be Inconsistent with the Statute

There is no doubt that the three House Committee consultants who urged Judge Weis to encourage adoption of the FCSC Subcommittee's proposed statute recognized at some point prior to the ultimate passage of the bill that the plain language of these provisions would overrule *Zahn*. As they subsequently wrote: "[o]n its face, section 1367 does not appear to forbid supplemental jurisdiction over claims of class members that do not satisfy section 1332's jurisdictional amount requirement." Thomas D. Rowe, Jr., et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Prof. Freer*, 40 Emory L.J. 943, 960 n.90 (1991).

19. Neither the consultants' prior correspondence, the transcript of the hearing, nor the voluminous submissions to the Subcommittee even mention *Zahn*.

Considering this to be a "problem" as to which "[i]t would have been better had the statute dealt explicitly," and unable at that point to alter the language of the bill itself, these three non-legislators took it upon themselves to attempt "to correct the oversight" by inserting into the House Report a one-sentence disclaimer. *Id.* at 950, 960 n.90. It says: "The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 101-734 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875.

In other words, recognizing that the true intent and effect of the proposed legislation was to overrule *Zahn*, these consultants undertook to hijack the legislation by filling what they have described as a "a statutory gap" with "history" which, in their own words, actually "misrepresents what the statute accomplishes."[20] Rowe, 40 Emory L.J. at 960 n.90; 1990 U.S.C.C.A.N. at 6874-75; *see also Rosmer*, 263 F.3d at 121 (discussing illegitimacy of this history).

The House passed the bill on September 27, 1990, and the Senate passed it on October 27, 1990, without floor debate in either chamber.

b. Contrived "Legislative History" Cannot Be Used to Alter the Statute

While in some circumstances Congressional reports can provide authoritative statements of Congressional intent, they cannot be used to supplant otherwise unambiguous statutory text. *See Garcia*, 469 U.S. at 76, 78 (observing that even a legislator's intent to alter clear language of a bill by making statements inconsistent with its meaning does not provide

20. Professors Rowe, Burbank, and Mengler later mocked this Court with their handiwork, stating: "[t]he resulting combination of statutory language and legislative history . . . creates the delicious possibility that despite Justice Scalia's opposition to the use of legislative history, he will have to look to the history or conclude that section 1367 has wiped *Zahn* off the books." Rowe, 40 Emory L.J. at 960 n.90.

"impressive" legislative history); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language."). This is particularly true in situations where, as here, there is evidence that the report has been manipulated in an effort to alter how the statute would later be interpreted. As Justice Scalia remarked in *Blanchard*:

> I am confident that only a small portion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; [and] that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue. . . . *[T]he purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.* . . . It is neither compatible with our judicial responsibility . . . nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.

Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring) (emphasis added).

In this instance, there can be no serious dispute that the sole purpose of the purported contrary "history" was "to influence judicial construction." The House Committee consultants' disclaimer is an example of the abuses possible if unelected individuals are able to alter laws passed by the elected representatives of the people.

c. The Legislative History Actually Undermines Exxon's Reading of the Statute

Finally, Exxon's argument that Congress intended subsection (a) to provide the desired limitations on supplemental jurisdiction in diversity suits is contradicted by the very legislative history Exxon is so desperate to reach. It is not subsection (a), but rather subsection (b), that is intended to achieve this result.

The House Report recognizes that § 1367(a) was intended to provide a sweeping grant of supplemental jurisdiction, and that subsection (b) was to fulfill the intent to impose certain limitations on that grant in diversity-only cases. It also equates the term "civil action" in subsection (a) with the terms "claim or claims":

> [Subsection (a)] generally authorizes the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as *the claim or claims* that provide the basis of the district court's original jurisdiction. . . .
>
> * * *
>
> [Subsection (b)] prohibits a district court in a case over which it has jurisdiction founded solely on the general diversity provision, 28 U.S.C. § 1332, from exercising supplemental jurisdiction in specified circumstances. . . .

1990 U.S.C.C.A.N. at 6874-75 (emphasis added).[21]

The House Committee consultants who planted the so-called contrary "history" have described the mechanics of the statute and the meaning of the term "civil action" in the same way as set forth in the House Report:

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21. It is relevant that the sentence inserted by the professors in the House Report, on which Exxon relies, does *not* appear in the discussion of subsection (a), but rather in the discussion of subsection (b). 1990 U.S.C.C.A.N. at 6874-75.

> Section 1367(a), for example, generally authorizes the district courts to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim that provides the basis of the district court's original jurisdiction. In reaching to the limits of Article III, subsection (a) codifies supplemental jurisdiction at the outer constitutional boundary that existed before *Finley*'s statutory revisionism.
>
> * * *
>
> Subsection (b) restricts the federal courts' exercise of supplemental jurisdiction in diversity cases by, in effect, codifying the principal rationale of *Owen Equipment & Erection Co. v. Kroger.*

Thomas D. Rowe, Jr., et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 215 (1991).[22]

Thus, there is simply no support in the legislative history for Exxon's contention of how the statute is to operate. As stated in the *Ortega* dissent: "The irony [of the minority view] is that it espouses the virtue of legislative intent, yet adopts a reading of § 1367 that was never articulated by any Congressperson or their staff, by any judge or jurist, nor by any academics, or, most importantly, by any of the drafters of the statute from the time the statute was adopted in 1990, until such 'intent' was just espoused in 1998." 370 F.3d at 144 (Torruella, J., dissenting).

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22. The House Committee consultants also recognized that § 1367 expressly provides for an additional exception to the statutory requirement of complete diversity of citizenship for Rule 20 plaintiffs. Rowe, 40 Emory L.J. at 961 n.91 ("[L]iterally, though, section 1367(b) does not bar an original complete diversity filing and subsequent amendment to add a non-diverse co-plaintiff under Rule 20, taking advantage of supplemental jurisdiction over the claim of the new plaintiff against the existing defendant.").

7. Exxon Vastly Overstates the Significance of § 1367's Overruling of *Zahn*

Exxon's related suggestion that § 1367 cannot have been intended to overturn the outcome in *Zahn* because it would lead to "absurd" consequences is similarly unsupportable, as there is no evidence that the end of *Zahn* will have adverse effects.

Consistent with the majority of commentators who had opined on the issue, the FCSC Subcommittee charged with examining the desirability of preserving *Zahn* concluded that, "[f]rom a policy standpoint, [*Zahn*] makes little sense." 1 Fed. Cts. Study Comm., Working Papers & Subcomm. Reports, at 561 n.33. Likewise, although a majority of the courts of appeals have now concluded that class actions brought by named plaintiffs who meet the jurisdictional minimum may include absent class members who do not, there has been no flood of federal court class actions. Plaintiffs continue to file large, multi-state class actions in state courts, specifically framing their complaints in a manner to avoid the possibility of removal. This has led many large multi-national companies, including Exxon, to lobby Congress to essentially federalize all significant multi-state class actions, by amending § 1332 to permit the aggregation of diversity-based class action claims for purposes of establishing the jurisdictional minimum.[23]

Indeed, it is precisely *because* the end of *Zahn* has done little to curtail plaintiffs' lawyers from "gaming the system" to avoid federal jurisdiction that Congress, supported by an announced majority of both houses, is currently considering the "Class Action Fairness Act" (S. 274; H.R. 1115), which would allow diversity jurisdiction in significant multi-state class actions

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23. Exxon has sponsored an article on the op-ed page of the New York Times urging the federalization of all class actions. N.Y. Times, May 25, 2000, at 29, reprinted in www.exxonmobil.com/files/corporate/000525.pdf. There can be little doubt that, had this case been brought in state court, Exxon would have removed the entire case to federal court.

even where (unlike here) no named plaintiff – let alone absent class members – can independently meet the jurisdictional minimum. As stated in the proposed Act's Senate Report:

> [C]lass action lawyers sometimes misuse the jurisdictional threshold to keep their cases out of federal court. For example, class action complaints often include a provision stating that no class member will seek more than $75,000 in relief, even though certain class members may be entitled to more and the class action seeks millions of dollars in the aggregate.
>
> This leads to the nonsensical result under which a citizen can bring a "federal case" by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state, while a class action involving 25 million people living in all fifty states and alleging claims against a manufacturer that are collectively worth $15 billion currently must usually be heard in state court. In other words, under the current jurisdictional rules, federal courts can assert diversity jurisdiction over a typical state law claim arising out of an auto accident between a driver from one state and a driver from another, but cannot assert jurisdiction over claims covering large-scale, interstate class actions involving thousands of plaintiffs from multiple states, defendants from many states, the laws of several states, and hundreds of millions of dollars.

S.R. Rep. No. 108-123, at 12 (2003), 2003 WL 21811251; *see also* H.R. Rep. No. 108-144, at 20 (2003), 2003 WL 21321526, at *20.

8. The Question Accepted for Review Does Not Fairly Include Exxon's Resumed Attack on Class Certification, Which Is Meritless in Any Event

The question accepted for review in this case expressly recognizes the indisputable existence of original "diversity jurisdiction over the individual claims of named plaintiffs." It further assumes the also indisputable existence of

supplemental jurisdiction over the claims of absent class members that satisfy the amount-in-controversy requirement. From that premise, the question addresses whether that original jurisdiction also enables supplemental jurisdiction "over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement." Thus, the question, on its face, presumes that the remedy in the event of a negative answer would be the retention of diversity jurisdiction over the named plaintiffs and those class members that *do* satisfy the minimum amount-in-controversy requirement, and the mere dismissal of the lesser claimants. As Exxon itself explained:

> [T]he issue is whether § 1367 legislatively overrules this Court's decision in *Zahn*, holding that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and *any plaintiff who does not must be dismissed from the case*."

Exxon Pet. at 10 (quoting *Zahn*, 414 U.S. at 301) (emphasis added).

Having lost its attempt to seek review of class certification, Exxon now attempts to revive and shoehorn that issue into this proceeding, by arguing – for the very first time – that if the Court answers the question presented in the negative, it should vacate the jury's verdict and require this fourteen-year-old twice-tried case to be refiled, recertified without the lesser claimants, and retried.

Exxon's new theory regarding what the appropriate remedy should be if it prevails raises issues which are neither within the question accepted for review itself nor "fairly included" therein. In fact, it directly contradicts the question, attacking its very predicate: the indisputable existence of original diversity jurisdiction over the named Plaintiffs' claims (and, inferentially, supplemental jurisdiction over the larger class members' claims). Needless to say, to consider these new issues would significantly change the substance of both the question and accompanying

petition for review. Therefore, they are improperly presented, and should not be considered. Sup. Ct. R. 14(a), 24(1)(a); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system."); *Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari.").

Were the Court to entertain Exxon's new argument, however, the result would be the same. From its unsupportable premise that "the courts below never had power in this case," Exxon Br. at 40, Exxon asserts that this "defect" cannot be cured through dismissal of the lesser claimants, because their inclusion "altered the proof of liability and damages in this case." *Id.* at 41.[24] Exxon is wrong.

Ironically, Exxon attempts to support its argument through reliance on *Newman-Green*. In that decision, the Court recognized that even a defect in complete diversity of citizenship does not "destroy" jurisdiction *ab initio* for the diverse parties, but may be cured through a *post*-judgment appellate dismissal of the non-diverse party. In particular, the Court directed that consideration must be made of the "practical" consequences of a case-wide dismissal, stating that parties "should not be compelled to jump through ... judicial hoops merely for the sake of hypertechnical jurisdictional purity." *Newman-Green*, 490 U.S. at 837. It then went on to state:

24. Exxon also generically complains that the certification of a "massive class" gives plaintiffs a "tactical advantage" because it "places intense pressure on a defendant to settle." Exxon's Br. at 41. In light of the fact that Exxon did *not* settle even in the face of certification of this "massive class," it is hard to fathom how it can possibly claim prejudice. Indeed, it seems beyond intelligent discussion that Exxon would be even *less* likely to achieve the "peace and finality" it purports to desire (*Id.* at 46) if thousands of class members are excluded, free to pursue multiple separate suits in friendly state courts offering punitive damages.

> In each case, the appellate court should carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation. It may be that the presence of the nondiverse party produced a tactical advantage for one party or another. If factual disputes arise, it might be appropriate to remand the case to the district court, which would be in a better position to make the prejudice determination.

Id. at 837-38 (affirming post-judgment appellate dismissal of non-diverse party).

In this case, there is no need to speculate as to whether the district court would find prejudice in the inclusion of the lesser claimants, or would simply dismiss them (the remedy specified in *Zahn*). For, as noted above, the district court has already rejected Exxon's argument, stating:

> I frankly find the argument to be frivolous and I think even if the question posed is answered for Exxon, the manner in which the question is posed answers the question, which is that those who don't meet the supplemental jurisdiction requirements would be out and everyone else would be in. I think it's that simple.

Tr., Hearing on Exxon's Motion for Stay Pending Supreme Court Review, Jan. 7, 2005, Doc. 1778 at 43. The reason for the district court's conclusion is clear: Exxon is confusing the issue of class membership with the nature of the evidence that proves its liability to all of its dealers.

Throughout this proceeding, not one but two trial judges[25] have repeatedly held that, by virtue of the collective nature of Exxon's on-average obligation to all dealers, Exxon's breach had to be proven on a collective basis. Accordingly, the proof would be literally identical regardless

25. This case was originally assigned to District Judge James Kehoe, who passed away in late 1998. The case was subsequently reassigned to District Judge Alan Gold.

of whether the class included one, one thousand, or ten thousand dealers.

On April 21, 1998, for instance, in denying Exxon's motion to decertify the class, Judge Kehoe held that:

> Exxon asserts that it has accomplished this "unbundling" of credit cost recovery fees .. . so that "on average, over time, across all markets," the reduction would be found in the ultimate price. By its very nature, this alleged obligation is owed to the entire class of dealers, the breach of which can be determined *only* by an "on average, over time, across all markets" analysis of Exxon's relationship with *all* of its dealers.

Order on Exxon's Motion to Decertify the Class for Counts I and III of the First Amended Complaint, April 21, 1998, at 1-2 (emphasis in original) [Doc. 912]. Judge Kehoe reiterated this view in denying Exxon's motion for summary judgment:

> Nor is particularized proof required for Plaintiffs to prove their case because Exxon's words, deeds and conduct were system-wide. . . . Indeed, the very essence of an obligation to reduce the wholesale price of motor fuel on average, over time, across all markets, to offset the credit cost recovery fee, involves system-wide proof regarding system-wide credit and pricing practices.

Order Denying Exxon's Motion for Summary Judgment on Count I, April 21, 1998, at 12 [Doc. 908].

This identical viewpoint was expressed again by Judge Gold shortly after he took over the case:

> Exxon's good faith duty, *according to the standard it established*, necessarily involves system-wide proof regarding system-wide credit and pricing practices. . . . For this reason, I disagree with Exxon's argument that such evidence is not "uniform" as to each dealer.

> Rather, the proffered evidence as to how Exxon was to carry out its good faith duty applies equally to all dealers, since all dealers were entitled to the same "on average" benefit, regardless of whether they individually received a dollar for dollar set off at all times within the twelve-year period of the DFC program.

Order on Exxon's Motion *in Limine* to Exclude Extrinsic Evidence to Establish the Alleged Obligation Under the Written Contracts, July 1, 1999, at 12 (emphasis added) [Doc. 1119]. Judge Gold subsequently clarified the on-average nature of the required proof, as follows:

> Consequently, while each class member asserts his or her individual claim based on their respective Sales Agreement with Exxon, Exxon owed the same duty of good faith performance to each and every dealer, and thereby, to the collective class as a whole. Specifically, Exxon's good faith performance obligation was to offset *on average among all its dealers from which the collective class of dealers nationwide would benefit.*

Order Denying Exxon's Renewed Motion for Summary Judgment on Count I, July 6, 1999, at 31-32 (emphasis in original) [Doc. 1129].

Similarly, in denying Exxon's *Daubert* motion challenging Plaintiffs' expert, whose opinion was based upon on-average data, Judge Gold stated that:

> Exxon's breach, if any, can be determined only by an "on average, over time, across all markets" analysis of Exxon['s] relationship with all of its dealers. . . . Exxon's stated position does not seem to be inconsistent. The use of "average nationwide" data for damage purposes is supported by Exxon's own answers to interrogatories. As set forth in Exxon's Interrogatory

> Response 67, . . . *"Exxon dealers were informed, and should have understood, that the reduction would only be 'on average' and that therefore the amount of their individual reduction in the wholesale prices would not necessarily offset the amount of the credit card processing charge each dealer individually paid."*

Omnibus Order on *Daubert* and Related Matters, July 28, 1999, at 17 n.16 (emphasis in original) [Doc. 1176]. Judge Gold also offered a scathing criticism of Exxon's post-trial assertion of the same unsuccessful argument:

> Although Exxon did its best to confuse the jury as to its obligation to its dealers with the tests used to prove or disprove its performance, Plaintiffs presented the jury with substantial evidence from Exxon's own documents and words that it would reduce the wholesale price of motor fuel charged to its Dealers during the Class Period by an amount that, on average, offset the 3% credit card recovery fee. The evidence further established that Exxon agreed to do so even if a dealer did not adopt and implement the DFC Program. The tools used by Plaintiffs to prove non-performance of the pricing obligation do not redefine the obligation. In the Court's view, Exxon's argument regarding conflict in the verdict form is a "smoke-screen" to hide from its own self-created obligation established during the creation and implementation of the DFC Program.

Order Denying Exxon's Rule 50 and 59 Motions, August 7, 2001, at 5-6 [Doc. 1463].

As set forth above, the collective nature of the proof as to liability and damages, in turn, enabled Judge Gold to utilize Rules 23 and 49 to fashion specific procedures that would allow any necessary elimination of claims post-trial or post-appeal, should Exxon prevail on any of its various asserted defenses. Order on Procedure at 117a-118a, 148a-150a, 153-156a. This included, significantly, the rejection of Plaintiffs' request for

entry of an aggregate judgment, in favor of Exxon's recommendation to withhold entry of judgments for members of the class until after the appeal:

> In the event subject matter jurisdiction is lacking, the Court cannot include in an aggregate damage award those claims of class members over which it has no jurisdiction. To do so would expose Exxon to potential double liability in the event it is successfully sued in state court by a class member who is dismissed for lack of subject matter jurisdiction. Moreover, in the event of remand, untangling those class members who are included in a gross award, but who do not meet threshold jurisdictional amounts, will necessitate a second inquiry into the value of each dealer's claim if Plaintiffs' proposal is followed. . . . Under Exxon's proposal, both inquiries can be conducted simultaneously during the claims process.

Id. at 117a-118a.

In view of this record, there is no conceivable justification for setting aside fourteen years of judicial labor on behalf of the thousands of class members who indisputably meet the jurisdictional minimum, simply because of the inclusion of absent lesser claimants. Nor is there any need to remand the case to the district court to determine the issue of prejudice, as it has already considered and rejected the argument. In the words of this Court: "Nothing but a waste of time and resources would be engendered by remanding to the District Court or by forcing these parties to begin anew." *Newman-Green*, 490 U.S. at 838.

In short, if the Court answers the question presented "no," the lesser claimants should simply "be dismissed," as this Court has previously directed. *Zahn*, 414 U.S. at 301; *Clark*, 306 U.S. at 590. In the alternative, it is appropriate for this Court to remand to the district court with instructions to enter an aggregate final judgment for the class as a whole. Because the jury found that Exxon had a collective obligation to offset its wholesale prices on average to the dealer class as a whole, Pet. App. 161a-163a,

"the rights of the different class members were common and undivided; in such cases aggregation [is] permitted."[26] *Snyder v. Harris*, 394 U.S. 332, 335 (1969).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed. If, however, the Court determines that the district court lacked subject matter jurisdiction over the class members with claims less than the jurisdictional amount, it should remand with instructions to retain jurisdiction over the class members with sufficient claims, and to continue the process of identifying and segregating the lesser class members for dismissal, subject to their rights to refile in a court of competent jurisdiction pursuant to the tolling provisions of § 1367(d).

Respectfully submitted,

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY
& ALLEN, P.A.
150 West Flagler Street
Suite 2000, Museum Tower
Miami, FL 33130
(305) 371-2223

EUGENE E. STEARNS*
MARK P. DIKEMAN
MONA E. MARKUS
MATTHEW W. BUTTRICK
DAVID C. POLLACK
STEARNS WEAVER MILLER
WEISSLER ALHADEFF
& SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, FL 33130
(305) 789-3200

Attorneys for Respondents

* *Counsel of Record*

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26. The district court determined that aggregation is not permissible in this case because it did not believe that money can form the requisite "res." Pet. App. at 111a. This determination is incorrect. *Shields v. Thomas*, 58 U.S. (17 How.) 3, 5 (1854).

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No. 04-70

IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

February 17, 2005

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly 200 years, the interpretation of 28 U.S.C. § 1332 announced in *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806), has governed the scope of a federal court's diversity jurisdiction: A federal court lacks jurisdiction over a civil action based on state law unless all plaintiffs are of diverse citizenship from all defendants. For more than 30 years, the interpretation of § 1332 announced in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), has governed the scope of a federal court's diversity jurisdiction: A federal court lacks jurisdiction over a class action based on state law unless each class member's claim exceeds the jurisdictional minimum prescribed in § 1332. Congress has never amended the diversity-jurisdiction statute in any way that calls either interpretation of § 1332 into doubt. See *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 373-74 (1978).

Respondents and the Government, however, read 28 U.S.C. § 1367 to reverse both *Strawbridge* and *Zahn*. If Congress had intended to overturn rules rooted in precedent nearly as old as diversity jurisdiction itself – rules that protect the federal courts from an increasing volume of state-law cases and that respect state sovereignty in the development and application of state law – it would have debated those issues at length. And, Congress would have spoken clearly to the issue, in the statutory text of § 1367 or § 1332, or in the legislative history. But Congress took none of these actions because it did not intend to make any fundamental change. A federal court sitting in diversity lacks "original jurisdiction" over a "civil action" where plaintiffs or class members do not satisfy the requirements of § 1332, and thus § 1367 does not authorize federal district courts to exercise supplemental jurisdiction in that setting.

In fact, Congress enacted § 1367 to overturn *Finley* v. *United States*, 490 U.S. 545 (1989). Rejecting substantial

contrary authority in lower federal courts, *Finley* had held that federal courts lacked pendent-party jurisdiction in federal-question cases and indicated that all extensions of pendent and ancillary jurisdiction should receive express congressional authorization. *Id.* at 546-47, 556. Section 1367 packaged pendent and ancillary jurisdiction under the rubric supplemental jurisdiction, and restored the law to its pre-*Finley* state. Respondents' effort to wrest a jurisdictional revolution out of a congressional effort to prevent a (different) jurisdictional revolution is ironic and incongruous.

This case presents the Court with a clear choice. If Exxon is correct, § 1367 provides the statutory foundation for the exercise of supplemental jurisdiction without expanding federal-diversity jurisdiction. If respondents are correct, § 1367 amends § 1332 through the backdoor in class and other multi-party cases in a manner that gives rise to nonsensical results. Members of Congress were expressly told by the authors of the House Report on the legislation that they were not altering the jurisdictional requirements of § 1332 and that the legislation was "noncontroversial," and "relatively modest." H.R. Rep. No. 101-734, at 28-29 & n.17, 15 (1990) ("House Report"). Nothing in the text of § 1367 would give a Member cause to doubt those representations. The best reading of § 1367 and the clear meaning conveyed in its legislative history fit comfortably within the legal framework that has long governed diversity jurisdiction. This Court should adopt that reading.

Finally, respondents claim that this Court lacks the authority to vacate the judgment and remand for reconsideration if this Court reverses the Eleventh Circuit's broad reading of § 1367, primarily on the ground that the validity of the judgment is not within the question presented. This cannot be correct; the proper disposition of this case following a decision that the court below lacked jurisdiction is necessarily within the question presented. Clearly, a reversal of the Eleventh Circuit would necessarily raise

questions related to the consequences of the district court's lack of jurisdiction – the definition of an appropriate class, the propriety of certification of that class, and the impact of the jurisdictional ruling on the judgment. If the district court certified a class and tried a class action over which it lacked jurisdiction, its judgment cannot stand, and the effect of the loss of jurisdiction on the case plainly must be examined.

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION OVER DIVERSITY-BASED CLASS ACTIONS IF SOME CLASS MEMBERS' CLAIMS DO NOT SATISFY THE JURISDICTIONAL AMOUNT.

The text of § 1367(a) makes clear that before a court can exercise supplemental jurisdiction over a claim, the court must have "original jurisdiction" over the "civil action." Respondents, purporting to rely upon the "plain language" of § 1367(a), *rewrite* it as follows:

> This subsection thus provides a broad grant of jurisdiction over any claim which forms part of the same case or controversy as a *claim* within the court's original jurisdiction. [Resp. Br. 18 (emphasis supplied).]

Respondents thus read § 1367(a) to say that if a court has original jurisdiction over *any* claim in a complaint, the court may exercise supplemental jurisdiction over *all other* claims that are part of the same case or controversy. That is not what § 1367(a) says.

The fundamental error pervading the analysis of respondents and the Government is their refusal to accept the implications of Congress's decision that in order to exercise supplemental jurisdiction, a district court must first have "original jurisdiction" over the entire "civil action," not just

over a single claim, analyzed in isolation, within the action.[1] The "civil action" language of § 1367(a) is critical here for two distinct reasons: (1) because this is a class action, and (2) because federal jurisdiction is asserted under the diversity statute only, and not the federal-question statute.

1. *A class action is its own civil action.* As Exxon explained in its opening brief, a class action is fundamentally different from individual and multi-party actions. A class-action complaint includes class allegations, is immediately treated as a class action unless and until the court denies certification, and immediately imposes special obligations on class counsel. Pet. Br. 17. The named plaintiff is a representative of the absent class members based on the legal and factual relationship between his or her claim and the claims of absent class members, and that relationship warrants binding unnamed class members to the outcome of the named plaintiff's litigation. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). The district court must certify or deny certification of the class at the earliest practicable moment. Fed. R. Civ. P. 23(c)(1)(A). As the Federal Rules of Civil Procedure and, indeed, the history of representative actions make clear, a class action is not an individual's "civil action" to which numerous other claims are later joined. Instead, a class action is a fundamentally different kind of aggregation, and class certification is qualitatively different from joinder or intervention.

Respondents seek to evade this point, and the necessary consequence that if a class includes members who do not satisfy the jurisdictional-amount requirement, the district court lacks original jurisdiction over the "civil action." Instead, they mischaracterize Exxon's brief as an argument

[1] In federal-question cases, a district court obtains jurisdiction over the "civil action" by virtue of the presence of a single federal claim. But the same analysis does not apply to diversity jurisdiction. *Infra* at 9-11.

that § 1367(a) does not authorize supplemental jurisdiction in class actions because § 1367(a) "does not specifically reference Rule 23," and dismiss this straw man as "peculiar." Resp. Br. 25. But, in interpreting § 1367(a) to authorize supplemental jurisdiction over unnamed class members, respondents wrongly assume that a district court with original jurisdiction over a named plaintiff's individual claim would also have jurisdiction over a class action in which the plaintiff is the class representative. These actions, however, are most emphatically not the same "civil action"; a court has original jurisdiction over the former, but not the latter. This response thus fails to speak to the critical point – that there are substantive and procedural differences between class actions and individual or other multi-party actions that make a class action a distinct type of "civil action," and not an individual claim to which other claims can be joined by the mechanism of supplemental jurisdiction. In a class action, the text of § 1367(a) permits supplemental jurisdiction only if the court has "original jurisdiction" over the class action itself; it does not permit the transformation and redefinition of the class itself through the mechanism of supplemental jurisdiction.

The Government tries to fill the gap left by respondents, claiming that the court has original jurisdiction over a class-action complaint at least until the class is certified and absent class members are bound. U.S. Br. 15.[2] It is true that absent class members are not bound until a class is certified, see *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). But, the Government's conclusion that a class action is initially the same as an individual action brought by the named plaintiff is wrong. As noted above, the law does *not* ignore class

[2] Even if a class-action complaint were treated as an individual claim before certification (which it is not), and even if § 1367(a) were interpreted to authorize supplemental jurisdiction over other individual claims that do not satisfy § 1332 (which it does not, *see infra* at 12-13), the result would not be a class action, but a multi-party case.

allegations in proceedings on a class-action complaint. For example, class allegations are tested from the outset; courts rule on them first, without consideration of a named plaintiff's substantive claims. See Fed. R. Civ. P. 23(c)(1)(A); *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 336 (1980) (class certification is collateral to a claim's merits). Limitations on all putative class members' claims are tolled, see *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 547-49 (1974); and class counsel assumes fiduciary obligations, see *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995). As experienced class-action litigators know, class action litigation is, from the beginning, fundamentally different from an individual action.

More importantly, in the very context presented here, this Court has already *rejected* the contention that class actions can be treated as individual "civil action[s]" to which massive numbers of claims are joined. This position was urged on the Court in *Zahn*, but was embraced only in the *dissenting* opinion. See 414 U.S. at 305 (Brennan, J., dissenting). Justice Brennan argued that the named plaintiff's individual claim constituted a civil "action" and that principles of ancillary jurisdiction brought the absent class members' claims before the court. This Court, however, refused to find that original jurisdiction over the "action" could be based on the fact that the named plaintiff's claim satisfied the jurisdictional minimum of § 1332. *Id.* at 298-301.

The Court's rejection of the ancillary-jurisdiction argument in *Zahn* severely undermines the Government's argument that § 1367 overrules *Zahn*. Section 1367(a) makes "original jurisdiction" over an "action" a prerequisite for supplemental jurisdiction; and in *Zahn*, this Court refused to find that the district court had original jurisdiction over the "action" even though the named plaintiff's claim satisfied the jurisdictional-amount requirement of § 1332. Indeed, § 1367(a) appears to use the very language necessary to preserve *Zahn*. And,

reading § 1367(a) to preserve *Zahn* is doubly justified; in *Zahn* itself, this Court observed that Congress could amend § 1332, but explained that *Zahn* would stand until "some express statement of [contrary] intention . . . appear[s]." 414 U.S. at 302.

2. *In a diversity case, "original jurisdiction" over a "civil action" requires analysis of each party's claims.* Respondents and the Government claim that a court's original diversity jurisdiction is not destroyed by the presence of a plaintiff whose claims fail to satisfy the jurisdictional minimum of § 1332. Acceptance of this view would revolutionize diversity jurisdiction, without the slightest indication that Congress intended to do so.

First, reading § 1367(a) to authorize federal courts with diversity jurisdiction over a single plaintiff's claims to exercise supplemental jurisdiction over non-compliant plaintiffs' claims simply cannot be squared with *Strawbridge*. *Strawbridge* included an individual claim over which the district court would have had jurisdiction had it been the sole claim in the action. See 7 U.S. (3 Cranch) at 267 (Massachusetts citizen sued Vermont citizen). But, in *Strawbridge* and since that time, this Court has uniformly held that the presence of a non-diverse defendant "destroys original jurisdiction" over the entire action. *Wisconsin Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 389 (1998).

Respondents and the Government acknowledge, as they must, the longstanding rule that the absence of complete diversity destroys jurisdiction over the entire action. Resp. Br. 22; U.S. Br. 13. But, they claim, § 1332 creates a hierarchy of jurisdictional elements within which complete diversity is more important than the minimum-amount requirement. Nothing in either the text of § 1332 or § 1367 or in this Court's decisions suggests that one jurisdictional element is of greater importance than another.

Section 1367 speaks simply of "original jurisdiction" over a "civil action"; and § 1332 defines when such original jurisdiction exists in diversity cases. Section 1332 provides that "citizens of different states" is a jurisdictional requirement, and *Strawbridge* interpreted this language to mean complete diversity. Section 1332 also speaks of the "matter in controversy"; in *Snyder* v. *Harris*, 394 U.S. 332, 336-37 (1969), this Court recited the long line of decisions interpreting that phrase to mean that the claims of each party in the case must exceed the jurisdictional amount. Nothing in the statute suggests a jurisdictional pecking order between the two, or that one is more fundamental than the other. Cf. *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 578, 584-85 (1999). Indeed, this Court has given a strong indication of the importance of the jurisdictional-amount requirement in the class setting by requiring that all putative class members satisfy it. See *Zahn*, 414 U.S. at 300-01. And neither respondents nor the Government offer any policy basis for introducing the potentially pernicious notion of more and less important jurisdictional facts in the diversity setting.

In arguing the jurisdictional-minimum requirement is less important, both the Government and respondents point out that in *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 590 (1939), this Court authorized dismissal of a party whose claim failed to meet the jurisdictional minimum in order to allow jurisdiction over the claim of another party who satisfied § 1332. See Resp. Br. 22; U.S. Br. 13-14. But *Clark* cannot bear the weight they place upon it. First, the Court has also authorized dismissal of a non-diverse party in order to allow jurisdiction over litigation among diverse parties, so this case cannot support differential treatment of the diverse-citizenship and minimum-amount requirements. See, *e.g.*, *Schacht*, 524 U.S. at 389; *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826 (1989); *Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61 (1996).

In any event, *Clark* supports the conclusion that a district court lacks *original* jurisdiction over an *action* as a whole so long as the non-compliant parties are in a case. It simply explains how to *cure* an acknowledged jurisdictional defect. It makes no sense to say, as respondents effectively do, that if a jurisdictional defect can be *cured*, then original jurisdiction is never lacking. Indeed, as the cases recited in the previous paragraph make clear, deficiencies in both complete diversity and jurisdictional amount can be cured under appropriate circumstances. Yet until that cure is effectuated, the absence of either jurisdictional element destroys jurisdiction over the entire action.

In the alternative, respondents and the Government urge this Court simply to ignore that their interpretation of § 1367(a) would overrule *Strawbridge*, because this case involves jurisdictional amount rather than complete diversity. See Resp. Br. 27; U.S. Br. 22. But, the *logic* of their interpretation would compel this Court to overrule *Strawbridge*; and it would be absurd to interpret § 1367 without recognizing and addressing that consequence of the interpretation proffered by respondents and the Government. Indeed, that consequence makes their interpretation exceedingly unlikely in this setting.

If this Court were to interpret the phrase "civil action of which the district courts have original jurisdiction" in § 1367(a) as respondents propose, it would have to hold that Congress intended to destroy the complete-diversity rule of § 1332 without so much as gesturing toward § 1332 with an eraser. *Strawbridge* means nothing if § 1367 authorizes a court to find a single claim in a diversity action that satisfies § 1332, and then to assert supplemental jurisdiction over non-compliant plaintiffs. *That* is how respondents and the Government read § 1367(a), and that is, accordingly, what is at stake. *Zahn* and *Strawbridge* stand or fall together.

Respondents and the Government inaptly rely on *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156

(1997) – a case involving *federal-question* jurisdiction – to support their broad reading of § 1367(a). Resp. Br. 20; U.S. Br. 11-12. In *City of Chicago*, the Court read § 1367 to codify the longstanding rule that the presence of a federal question in a case provides "original jurisdiction" over the entire "civil action," such that supplemental jurisdiction may be asserted over other claims in the action. 522 U.S. at 164-66. As *City of Chicago* recognized, this rule was in place *before* Congress enacted § 1367 and has always been limited to federal-question cases: "this Court has long adhered to principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction *over federal questions* carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact.'" *Id.* at 164-65 (emphasis added) (quoting *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 725 (1966)). Respondents and the Government apparently contend that § 1367(a) cast aside the established limits on the scope of "original jurisdiction" in a "civil action" under § 1332, and applied the broader definition of "original jurisdiction" in a "civil action" used in federal-question cases. Yet they neither identify a textual hook for that interpretation nor explain why Congress would alter decades of law differentiating diversity and federal-question jurisdiction in the *supplemental*-jurisdiction statute.

In fact, for several reasons, Congress has long acquiesced in this Court's delineation of relatively broad supplemental jurisdiction in federal-question cases and substantially narrower supplemental jurisdiction in diversity cases. There is a particularly strong federal interest in federal-court resolution of federal questions to promote uniformity in the interpretation and application of federal law through the federal appellate process. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.). Further, traditionally, there has been a concern that state courts would prove hostile to federal claims. See *Merrell Dow Pharms., Inc.* v. *Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (describing Congress's historical understanding that federal courts are more sympathetic to federal rights than state courts). Neither of these concerns is present when federal courts adjudicate state-law claims in diversity actions. Indeed, it has been questioned whether there is a continuing need for diversity jurisdiction. See, *e.g.*, Fed. Courts Study Comm., 101st Cong., *Report of the Federal Courts Study Committee* 38-45 (Comm. Print 1990) ("Study Committee Report").

Moreover, the supplemental-jurisdiction statute was enacted in response to a perceived threat to federal-question jurisdiction. Congress acted only after *Finley* altered the rules of pendent jurisdiction in a way that threatened severely to limit federal-court adjudication of federal claims, and Congress sought only to restore and codify the rules as they existed *before Finley*. Specifically, after *Finley* rejected pendent-party jurisdiction in federal-question cases and appeared to require statutory authorization for any pendent or ancillary jurisdiction, Congress was concerned that a plaintiff with federal and state claims against different defendants would be forced to litigate federal claims in state court in order to bring all claims in a single forum. Section 1367(a) restored the federal forum for adjudication of federal claims brought in conjunction with state claims against multiple parties. Nothing in this context or in 1367(a)'s text suggests a congressional intent dramatically to alter the scope of § 1332.

An ambiguous statutory term should be interpreted in a way "which fits most logically and comfortably within the body of . . . previously . . . enacted law." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991), *superseded by statute on other grounds, Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). The phrase "civil action of which the district courts have original jurisdiction" in § 1367(a) incorporates another federal statute, § 1332, that has an established interpretation based on numerous decisions of this

Court. Only Exxon's interpretation of § 1367(a) fits logically with § 1332 and its established interpretation.

3. *Section 1367(b) does not support a broad reading of "civil action" in § 1367(a).* Viewed in its legal and historical context, § 1367(a) does not authorize supplemental jurisdiction over the class action in this case. With their "plain meaning" argument eliminated, respondents and the Government are left with the argument that § 1367(b) lacks content if Exxon's interpretation is correct. Resp. Br. 20; U.S. Br. 20. They contend that under Exxon's interpretation of § 1367(a), the federal courts never have supplemental jurisdiction over *any* claim in a diversity case. "In fact," says the Government, "Congress could have dispensed with subsection (b) altogether." U.S. Br. 20.

This is clearly wrong. Exxon's reading of § 1367 does not eliminate supplemental jurisdiction in diversity cases; it simply leaves in place the rules that limit diversity-based supplemental jurisdiction to cases which do not undermine the fundamental premises of *Strawbridge* and *Zahn*. Evasions of the complete-diversity rule and the minimum-amount requirement are not allowed. But, § 1367(a) authorizes supplemental jurisdiction in diversity cases over "claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court," even where there is no independent basis of jurisdiction for the new claim. See *Owen Equip.*, 437 U.S. at 376.

For example, § 1367 allows supplemental jurisdiction over a compulsory counterclaim by a defendant in a diversity case, even if the amount-in-controversy in that claim is less than § 1332's jurisdictional minimum. "Original jurisdiction" over the "civil action" is not destroyed by the defendant's assertion of a compulsory counterclaim, and § 1367(b) does not deprive the court of the jurisdiction granted in § 1367(a).

Section 1367 is not a model of efficient draftsmanship. Both parties' readings of § 1367 render some portion of the statute superfluous. Under Exxon's interpretation, certain provisions in § 1367(b) simply underscore the absence of supplemental jurisdiction that already follows from its reading of § 1367(a) alone (*e.g.*, § 1367(b)'s denial of supplemental jurisdiction for plaintiffs' claims against persons made parties under Rule 20). And under respondents' and the Government's reading of the first sentence of § 1367(a), there was no need to add the second sentence which specifies that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." Of course, all parties find explanations of emphasis or clarification for their own redundancies; but the reality is that *no* construction of § 1367 makes sense of every word.

Instead, this Court should adopt the construction of § 1367 that makes the most sense of the statute's terms in light of its text and purposes in the legal and historical context in which it was adopted. See *West Virginia Univ. Hosps.*, 499 U.S. at 101 (the Court's "role [is] to make sense, rather than nonsense out of the *corpus juri*"); *In re Chapman*, 166 U.S. 661, 667 (1897). Exxon's interpretation is based on a straightforward congressional purpose to restore the pre-*Finley* law of ancillary and pendent jurisdiction.[3]

Respondents and the Government, in contrast, offer no principle or set of principles that might have led Congress to the supplemental-jurisdiction scheme they urge the Court to adopt. On their reading, the complete-diversity rule bars an Illinois plaintiff from asserting state-law claims in federal

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[3] As noted in Exxon's opening brief, § 1367 modified the then-prevailing view of ancillary jurisdiction in *one* respect: Congress chose *not* to allow supplemental jurisdiction in diversity cases over the claims of parties entitled to intervene under Rule 24(a). *See* Pet. Br. 26.

court against both an Indiana and an Illinois citizen, but allows an Illinois and an Indiana citizen jointly to assert state-law claims in federal court against an Illinois citizen. Moreover, respondents and the Government say that § 1367 authorizes supplemental jurisdiction over state-law claims that do not satisfy § 1332 if the plaintiffs are brought into a case under the *permissive* joinder provisions of Federal Rules of Civil Procedure 20 and 23 (even though the claims do not satisfy § 1332), but denies supplemental jurisdiction over the claims of non-compliant plaintiffs whose presence is *necessary* for just adjudication. Courts must sometimes enforce incoherent legislative schemes mandated by statutory text; but here, § 1367's text supports a sensible interpretation that comports with Congress's purpose. *Bank One Chi., N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 275 (1996) (rejecting statutory interpretation that "yield[s] an incoherent jurisdictional scheme").

4. *The legislative history fully supports Exxon's interpretation of § 1367.* The legislative history of § 1367 provides substantial support for the interpretation already mandated by its text, structure and legal context. Specifically, the House Report expressly confirms Exxon's interpretation.

In that Report, the Congress that enacted § 1367 was informed that it concerned only *supplemental* jurisdiction, and would not alter the underlying rules concerning original jurisdiction in diversity cases. See House Report at 29 & n. 17 (§ 1367 "is not intended to affect the jurisdictional requirements of . . . § 1332" and expressly preserves *Zahn*'s interpretation of § 1332). This makes sense because Congress would not have fundamentally altered § 1332 through the round-about mechanism of a supplemental-jurisdiction statute. See also *id.* at 15, 28 (legislation is "noncontroversial" and "relatively modest"). In any event, the Report is explicit confirmation for the better reading of § 1367's language and structure.

Respondents ask this Court to disregard the clear statements of congressional intent, by claiming that they are essentially fraudulent. Resp. Br. 37 (accusing authors of *Zahn* statement in House Report of "hijack[ing]" legislation that overruled *Zahn*).[4] The accusation is overwrought and beside the point. It is overwrought because it treats one law professor's accusation against other professors as an admission of impropriety by the others, who were participants in the work of the Federal Courts Study Committee ("FCSC") and were thus involved in the legislative process that produced § 1367. See Rowe, Burbank & Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943, 950, 960 n.90 (1991). But, FCSC participants have never said that the legislative history and the text cannot be squared; they only feared that a court "may" see it that way. *Id.* at 950.[5]

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[4] The Government urges the Court to disregard the statements solely on the ground that they cannot be squared with § 1367's plain language. U.S. Br. 27-28. This is effectively a concession that if § 1367 can reasonably be read as Exxon suggests, this clear legislative history strongly supports Exxon's reading of § 1367. *See Toibb* v. *Radloff*, 501 U.S. 157, 162 (1991) ("a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity").

[5] A review of the drafting history of § 1367 supports the House Report's endorsement of *Zahn* and *Strawbridge*. As detailed in the Brief of Respondent in this case's companion, a FCSC subcommittee originally proposed to abolish *Zahn*, but the full FCSC rejected that view in favor of generally *narrowing*, not expanding, diversity jurisdiction. The FCSC Chair submitted a statement to the House Subcommittee on Courts that was drafting supplemental-jurisdiction legislation and objected to an early draft because it would undermine *Strawbridge* and *Owen*, expanding diversity jurisdiction. The Chair then proposed statutory language that he thought would fulfill the FCSC goal of preserving settled limits on diversity jurisdiction. The final version of the bill including § 1367, is even narrower than that proposed by the FCSC Chair. *See* Br. for Resp. at 38-40, *Ortega* v. *Star-Kist Foods, Inc.*, No. 04-79 (U.S. filed Jan. 18, 2005).

Even more important, the accusation is beside the point. Legislative history is valuable as an interpretive aid to the extent it illuminates congressional intent. The members of Congress who looked to the House Report to assess the legislation they were voting for (or against) would have learned that it was intended to preserve *Zahn*, and enacted § 1367 on this understanding without regard to the process that led to its inclusion. See *Eldred* v. *Ashcroft*, 537 U.S. 186, 209 n.16 (2003) ("'[i]n surveying legislative history, we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill'") (quoting *Garcia* v. *United States*, 469 U.S. 70, 76 (1984)). Thus, the House Report confirms what common sense suggests: Congress did not intend to amend the longstanding limitations on § 1332 established in *Strawbridge* and *Zahn* when they enacted § 1367.

II. THE JUDGMENT SHOULD BE VACATED BECAUSE THE COURT LACKED JURISDICTION OVER THE ACTION.

If this Court concludes that the district court lacked jurisdiction over this class action, it must determine the proper disposition of the case. Respondents wrongly assert that the question presented determines the proper disposition – excision from the class of those members whose claims do not satisfy the jurisdictional minimum. Resp. Br. 42-43.

The question presented does not assume that the district court had jurisdiction over this civil action. To the contrary, it asks the Court to find that the district court lacked such jurisdiction. The question presented simply accepts that *if* the "individual claims" of the named plaintiffs had not been aggregated with the claims of noncompliant class members through the class-certification mechanism, the district court would have had "original jurisdiction" over those "claims." The question presented, however, makes *no* assumption about the consequences that follow if the district court lacked

original diversity jurisdiction over a class action that included non-compliant members. And, if this Court concludes that the district court lacked such jurisdiction, the proper disposition of this case is not only "fairly included" in the question presented, Sup. Ct. R. 14.1(a), it is necessarily before this Court. Indeed, even respondents acknowledge that one analytical question facing the Court is whether the inclusion of non-compliant parties destroys the district court's original jurisdiction, see Resp. Br. 22, an admission that necessarily means that the consequences of the absence of such jurisdiction must be addressed by this Court or by another court on remand.

It is equally clear that if the district court never had "original jurisdiction" over this "civil action," it was without power to act, much less enter a valid judgment. *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 16-19 (1951); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). And, the only reason this Court would not simply vacate the judgment would be if this Court were to determine, as in *Newman-Green*, that the jurisdictional defect could be cured through an "[a]ppellate-level amendment[]." 490 U.S. at 836. But, for several reasons, this is not such a case.

First, the usual appellate-level amendment is to drop the parties that destroy the court's diversity jurisdiction. That was the path taken by this Court in *Clark*. But, because this is a *class* case, that path is not available. Where, as in *Clark*, a party is joined in litigation through Federal Rule of Civil Procedure 20, the dismissal of that party does not inherently undermine the course of proceedings and prior court rulings. That is not true in a class action. In order to alter the scope of a certified class, the court must define and certify an entirely new class. The Rule 23 inquiry is complex and fact specific, and district courts have broad discretion over whether to certify a class. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979). In addition, the scope and nature of a class certification fundamentally alters the dynamics of litigation,

as this Court has recognized. See Pet. Br. 41-46. This Court has instructed that appellate-level amendments to cure jurisdictional defects should be used "sparingly," and the class-action context warrants particularly careful treatment.

More specifically, clearly, in this case, "the presence of [a] nondiverse party produced a tactical advantage" for plaintiffs to the substantial prejudice of Exxon, for reasons set forth in the opening brief. *Newman-Green*, 490 U.S. at 838. In addition, respondents fail adequately to consider the practical consequences of the jurisdictional holding. Assume that the district court had recognized that it lacked jurisdiction to decide the claims of thousands of Exxon dealers who do not satisfy the minimum-amount requirement. At that point, the district court considering whether to certify the federal class would have been confronted with the fact that dismissed dealers would have to bring their claims in smaller state-court class actions in several states, that the state-court class actions would proceed at the same time as the federal class action and would duplicate the federal action; and that the state courts would have the final word on the interpretation and application of state law to the claims at issue.

In this setting, there is a serious question whether the district court would have considered a federal class action "superior" to other methods of adjudicating these claims (to wit, the state-court classes that even the larger dealers would be free to join). One purpose of Rule 23 is to avoid the unnecessary duplication of actions. *Walters* v. *Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). And, manageability issues would be raised if a federal class action were running parallel with state class actions. *Amchem Prods.*, 521 U.S. at 620 (district court must consider manageability when certifying a litigation class). The district court in *Zahn* itself perceived that a change in the composition of the class affects the propriety of class certification. *Zahn* v. *International Paper Co.*, 53 F.R.D. 430, 433-34 (1973), *aff'd*, 496 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973). The same inquiry

should have taken place here, but did not, to Exxon's prejudice.

Further reason to vacate the judgment in this case arises out of the powerful precedent this Court's disposition will set for future class cases involving class members whose claims destroy jurisdiction. If a district court can certify a class over which it lacks jurisdiction and postpone the determination of whose presence destroys jurisdiction, serious procedural problems ensue. Can such a class action be validly settled? A court order approving a settlement is required in class cases. Fed. R. Civ. P. 23(e). That order, like any order, would be void if entered without jurisdiction. *Costello* v. *United States*, 365 U.S. 265, 285 (1961). The same jurisdictional defect would constrain a settling party's ability to enforce a settlement agreement against the putative class members. See *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994) (per curiam). In addition, if the case were to go to trial, the uncertain size and scope of the class would certainly affect not only the settlement process, but also the trial process. This Court should make clear that district courts may not certify classes without first satisfying themselves of their jurisdiction over the defined class. This rule merely applies *Steel Company* to the class-certification context.

Finally, the judgment should be vacated because the jurisdictional error infected the course of the litigation, including the trial. As a practical matter, it is clear that litigation and trial strategy are substantially affected not only by class certification, but by the scope of a certified class. Had the plaintiff class been substantially smaller, both settlement and trial tactics would have differed.

Equally to the point, respondents are wrong when they say that dealers' damages would have been the same had the class consisted of ten dealers or ten thousand. The jury expressly found that Exxon was "[r]equired to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit card recovery fee during the Class Period," but was

not required "to reduce the price of motor fuel *to each dealer* by an amount that, on average, offset the 3% credit card recovery fee during the Class Period." Pet. App. 161a. Apparently, the jury found that some dealers were damaged by a higher percentage and some by a lower percentage, necessarily indicating that the certification of a smaller class of large dealers might have altered the damages per dealer. See Pet. Br. 46-48.[6] When this is combined with the unlawful class, it becomes clear that the judgment entered should be vacated.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 17, 2005

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[6] In the alternative, respondents urge this Court to treat the class claims as if they asserted an interest in a "common and undivided" right, which, they claim, would permit aggregation of each class member's claims to satisfy the jurisdictional amount. Resp. Br. 49-50. That argument is baseless. This is not a case, like *Shields* v. *Thomas*, 58 U.S. (17 How.) 3 (1854), where each individual plaintiff's right to sue emanated from a common source: the estate of a deceased from which the defendant had wrongfully converted property. Because each plaintiff in *Shields* sued as a representative of that estate, each plaintiff was seeking recovery of a portion of the total amount owed to the estate. The Court therefore determined that aggregation was appropriate. *Id.* at 4-5. Nothing of the sort is at issue here; each plaintiff has sued to recover the amount it alleges it is owed under its own contract. *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U.S. 39, 41 (1911) (aggregation permitted in case by two plaintiffs asserting "single and undivided" right to enforce a common lien on a particular property; had plaintiffs sued only under their separate contracts, and not in their status as lienholders, claims would have been "separate and distinct" and aggregation would not have been permitted).

(14)

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IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF EXXON CORPORATION

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 25, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION

As the text of the Class Action Fairness Act ("CAFA") reveals, CAFA is not retroactive. See CAFA, S. 5, 109th Cong. § 9 (2005) (enacted) (Resp. Supp. Br. App. 26a). Thus, CAFA does not apply to the instant case which – like thousands of other class actions pending in state and federal court, including all class actions recently filed in anticipation of CAFA's enactment – is governed by jurisdictional rules extant at the time the complaint was filed. Respondents nonetheless argue that CAFA's passage aids their cause in two respects.

First, they claim that Congress's 2005 enactment of CAFA – an Act that expressly amends 28 U.S.C. § 1332 to authorize federal jurisdiction over class actions seeking aggregate damages of $5 million or more – demonstrates that Congress's 1991 enactment of 28 U.S.C. § 1367 was intended to authorize federal jurisdiction over class actions including members whose claims do not satisfy the minimum-amount requirement. This argument contravenes established principles of statutory interpretation; in fact, CAFA illustrates that when Congress intends to alter the settled meaning of § 1332, it does so directly by amending § 1332, and not through enactment of a supplemental-jurisdiction statute.

Second, respondents wrongly claim that as a result of the passage of CAFA, Exxon cannot obtain relief if the Court holds that the district court lacked jurisdiction over this class action. Respondents persist in ignoring that the court tried a case over which it lacked jurisdiction to the prejudice of Exxon; the fact that the court would have jurisdiction over this action had it been filed today does not alter the court's lack of jurisdiction when this case was filed. Indeed, as Exxon showed in its brief, if the proper jurisdictional rules in effect at the time had been applied, the class at issue may not have even been certified because a number of other state law

class actions likely would have proceeded in its stead. See Exxon Reply 18. And, because the judgment is invalid, it has no collateral-estoppel effect. If this Court determines that the district court lacked jurisdiction over the class as certified and remands this action, then the court will have to apply the proper (pre-CAFA) jurisdictional rule and determine whether a class can lawfully be certified and, if so, how that class's claims will be tried.

Moreover, although respondents express certainty that the non-compliant former class members will be able to file a new multi-state class action in federal court, these former class members' claims arise under the laws of at least 35 different states, meaning that a remand might result in 35 smaller class actions where the state-law issues submerged in this federal behemoth were ignored or disregarded and where the dynamics of litigation would be entirely different.

ARGUMENT

I. THE PASSAGE OF CAFA UNDERMINES, RATHER THAN SUPPORTS, RESPONDENTS' INTERPRETATION OF § 1367.

In respondents' view, CAFA demonstrates that Congress wants diversity-based class actions seeking large aggregate damages to be resolved in federal courts; and, respondents apparently believe that the intent of Congress in enacting CAFA in 2005 is somehow relevant to discerning the intent of Congress in enacting the supplemental-jurisdiction statute in 1990. Respondents' premise is simply wrong. "[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie* v. *United States*, 519 U.S. 79, 90 (1996). See also *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 114 (1989) ("'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'") (alteration omitted) (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)). There is no reason to

imagine that the 2005 Congress and the 1990 Congress held the same views about the proper scope of federal diversity jurisdiction. And, there is absolutely no basis for assuming that the 2005 Congress was endorsing any particular interpretation of § 1367.

Indeed, if anything, CAFA suggests that respondents are wrong. First, in CAFA, Congress decided to alter the scope of diversity jurisdiction and did so *by amending § 1332*. When Congress wants to alter dramatically the scope of diversity jurisdiction, it does so directly and unequivocally, not in the roundabout, unclear way that respondents posit in this case (*viz.*, through enactment of a supplemental-jurisdiction statute). Second, while the enactment of § 1367 was "noncontroversial," and entirely in harmony with the then-prevalent view that federal diversity jurisdiction should diminish, CAFA was hotly debated and controversial. CAFA expanded federal diversity jurisdiction in a particular context in response to an evolving view that certain state courts have not fairly managed class actions and thus were ill serving plaintiffs and wrongfully discriminating against corporate defendants. The publicity surrounding CAFA's fundamental change in diversity serves as stark contrast to the "modest" change in 1990.

More specifically, respondents first cite Exxon's showing that respondents' interpretation of § 1367 would allow a substantial, unintended expansion of federal diversity jurisdiction; they say that Exxon cannot be correct because CAFA reflects Congress's view that class action counsel have been successfully gaming the system to *avoid* federal diversity jurisdiction. Resp. Supp. Br. 2-3. Of course, there were at least three courts of appeals and numerous district courts that did *not* interpret § 1367 to overrule *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), mitigating the inference respondents would draw.

In any event, Congress's view that class counsel have routinely been able to "game the system" to avoid federal

jurisdiction when they want to do so – *e.g.*, by ensuring that no individual makes a claim that satisfies the minimum-amount requirement or by joining parties to prevent satisfaction of the complete-diversity requirement – has no bearing on Exxon's argument. If § 1367 is interpreted to authorize federal diversity jurisdiction over a class action or multi-party case where only one plaintiff satisfies the minimum-amount requirement, that interpretation works a substantial, additional expansion in diversity jurisdiction, one not intended by the Congress that enacted § 1367. It is not relevant that respondents' interpretation of § 1367 fails to abrogate *all* limits on diversity jurisdiction; it does excise one very important limit without the slightest indication that Congress intended to do so.

Respondents next suggest that CAFA dispels any notion that Congress is hostile to diversity jurisdiction, Resp. Supp. Br. 4, as if the 2005 Congress and the 1990 Congress are the same entity and could not possibly have different views on the subject. Of course, CAFA reflects this Congress's view that, in light of certain abusive lawsuit practices in state courts, diversity jurisdiction should be expanded in the class-action setting as a partial antidote to those practices. But, respondents' triumphant quotation of the findings and purposes of CAFA casts no doubt on the validity of Exxon's demonstration that for decades, federal diversity jurisdiction was limited by Congress and by this Court, and that the 1990 Congress did not intend a dramatic expansion in diversity jurisdiction under § 1332 when it enacted the supplemental-jurisdiction statute.

In sum, CAFA is not retroactive, and the 2005 Congress is not channeling the views of the 1990 Congress that enacted § 1367. If it suggests anything, CAFA suggests that Congress knows how to alter the scope of diversity jurisdiction when it wishes to do so, and that it does not hide fundamental amendments to § 1332 in other statutes.

II. CAFA IS NOT RETROACTIVE AND DOES NOT ALTER THE APPROPRIATE OUTCOME IN THIS CASE.

CAFA applies only to cases filed after its enactment. Thousands of class actions arising in diversity jurisdiction, including this case, are governed by pre-CAFA law, and there is a conflict among the circuits on the scope of federal jurisdiction in such cases. The resolution of that conflict will decide this case and all other cases presenting the same issue and pending as of February 17, 2005.

Despite the fact that CAFA is not retroactive, respondents claim that the resolution of the supplemental-jurisdiction question presented is no longer important in this case. Respondents first contend that if this Court were to hold that the district court lacked jurisdiction, its holding would apply only to "the subclass made up of the lesser claimants." Resp. Supp. Br. 7. Of course, there is no such "subclass." The certified class was defined to include all dealers, and that is how the case was tried. In fact, as Exxon has showed, the district court lacked any jurisdiction over this class as certified and hence lacked any jurisdiction over this case. That raises the question of what occurs when the class is decertified as a proper remedy for the violation of § 1332 and the non-compliant class members are dismissed from the case. In this setting, the judgment cannot simply be affirmed because, for all the reasons set out in Exxon's opening and reply briefs, Exxon was prejudiced by the wrongful certification and the wrongful exercise of jurisdiction. See Exxon Br. 40-49; Exxon Reply 16-20. Indeed, if the district court lacked jurisdiction over the class as defined and could have certified only a class of dealers whose claims exceeded the jurisdictional minimum, the federal multi-state class action should not have been deemed superior to individual state class actions, see *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

Thus, the judgment entered was void. For two reasons, this is not a case like *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826 (1978), or *Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61 (1996), where, before judgment was entered, the jurisdictional defect was permissibly cured by the dismissal of the party that destroyed jurisdiction. First, as noted above, Exxon was prejudiced by the wrongful exercise of jurisdiction. But, in addition, this is a case where the district court lacked jurisdiction over the defined class itself; no party's dismissal could cure that defect because a class action is a representative suit and the fundamental alteration of a class requires a new class definition and a new class certification. See Exxon Br. 40-48; Exxon Reply 16-20. This is instead a case like *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 124 S. Ct. 1920 (2004). In that case, the district court lacked diversity jurisdiction at the time of the filing of a complaint because the plaintiffs were Mexican and two members of the defendant partnership were Mexican. This Court held that the absence of diversity jurisdiction at the time of the filing of the complaint could *not* be cured retroactively by the departure of the two Mexican members of the partnership, because the same artificial entity – the partnership – remained the defendant. Similarly here, the class is an artificial entity; an alteration in its composition does not alter the fact that the court lacked jurisdiction over the class as defined. This jurisdictional defect cannot be cured by the mere dismissal of non-compliant class members; a wholly new class must be defined and certified. And thus here, as in *Grupo Dataflux*, the consequence – the vacatur of the judgment – should be ordered "regardless of the costs it imposes" if jurisdictional rules are to be taken seriously. *Id.* at 1924. This, in turn, requires that the courts to address the question whether an appropriate class of members who satisfy *pre-CAFA § 1332* can be certified; and, if such a class is certified, its claims must be adjudicated.

Moreover, plainly, a judgment entered without jurisdiction has no collateral estoppel effect. See *Restatement (Second) Judgments* §§ 1, 27 (1982) (for collateral estoppel to apply, the court must have issued a valid, final judgment, and a court cannot issue such a judgment unless it had jurisdiction). Exxon, accordingly, will not simply be deemed liable by virtue of collateral estoppel in the non-compliant plaintiffs' subsequent federal or state court actions filed after the effective date of CAFA.

Respondents assert, however, that if the non-compliant class members are dismissed, they will simply file a follow-on, federal multi-state class action raising the same claims as this federal action. But, under CAFA, it is far from clear that such a multi-state class action in federal court would be certified. As respondents themselves explain, 35 different state laws may be involved, Resp. Supp. Brief 8; the court may decide that 35 class actions based on the claims of plaintiffs in the 35 relevant states would be more manageable and superior to a single multi-state action. The court may determine that there should be 35 federal actions under CAFA. In addition, respondents claim in their Supplemental Brief that this case would support "additional state and federal claims, including state law claims for punitive damages." *Id.* This concession is startling because it clearly means that some class members would be better off pursuing individual claims; but equally to the point, state-by-state actions are likely superior because they permit each individual court the opportunity to address the significant differences in state-law standards of liability and state-law remedies. Put differently, respondents have effectively acknowledged that state laws vary and that different class members are differently situated with respect to their claims of damages from Exxon.

CAFA is not germane to Exxon's case; the judgment below was entered by a court without jurisdiction to act, and it should be vacated.

CONCLUSION

For the reasons set forth herein, and in Exxon's opening and reply briefs, the decision below should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN &
WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

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* Counsel of Record

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IN THE

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EXXON CORPORATION,

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v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL MERITS BRIEF

EUGENE E. STEARNS*
STEARNS WEAVER MILLER
WEISSLER ALHADEFF
& SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, FL 33130
(305) 789-3200

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY
& ALLEN, P.A.
150 West Flagler Street
2000 Museum Tower
Miami, FL 33130
(305) 371-2223

Attorneys for Respondents

* *Counsel of Record*

192944

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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THE CIRCUMSTANCES REQUIRING SUPPLEMENTAL BRIEFING

After Respondents filed and served their merits brief, on February 17, 2005, Congress passed The Class Action Fairness Act of 2005, Public Law No. 109-002 (the "Act"), which creates federal subject matter jurisdiction over multi-state class actions in which the aggregate amount in controversy exceeds $5 million. The following day, the President signed the Act into law. The Act is applicable to all class actions filed after its enactment date. The text of the Act is appended hereto.[1]

RELEVANCE OF THE ACT TO THE QUESTION PRESENTED

Exxon's principal argument is that the plain wording of 28 U.S.C. § 1367 does not mean what it says because it is inconceivable that Congress could have intended to expand federal diversity jurisdiction over class actions by overruling *Zahn*. Congress' passage of the Act, which further extends federal jurisdiction beyond the limited expansion resulting from § 1367, completely negates this central premise of Exxon's entire appeal.

Not only do the reasons expressed by Congress in adopting the Act serve to demonstrate the limited practical impact that § 1367's overruling of *Zahn* has actually had on federal court caseloads, passage of the Act demonstrates that Exxon's presumption of Congressional antipathy towards diversity jurisdiction over class actions is completely unfounded.

---

1. The appended text of the Act was obtained from the bill, S. 5, as engrossed as passed by the Senate, which is available on the active legislation list on the Senate's website at *www.senate.gov*.

In addition, even if Exxon were to prevail on the question presented, the passage of the Act, combined with the tolling provisions of § 1367(d), will enable dismissed class members to file a new class action in federal court, as the lesser class members are citizens of at least 35 different states and their claims in the aggregate are substantially greater than $5 million. The result would be the same even were Exxon to obtain the relief sought in its Brief (but not in the question presented) – dismissal of the entire action – because the dismissed case could simply be re-filed in federal court under the Act.

Thus, all that is left of Exxon's petition is a procedural gambit to obtain a new trial and further delay final resolution of this fourteen year old, twice- tried case in which the claims administration process must still be traversed.

1. The Limited Practical Impact on Federal Diversity Jurisdiction That has Resulted from the Overruling of *Zahn*

Enactment of the Act demonstrates that Exxon has vastly overstated the practical significance of § 1367's overruling of *Zahn* in the federal court system. In its merits brief, Exxon argues that:

> [T]he Eleventh Circuit's interpretation would result in the litigation of virtually all diversity-based class actions in federal court, in contravention of Congress' express intent. [Exxon Br. at12]
>
> * * *
>
> The Eleventh Circuit's interpretation of § 1367 would substantially increase the scope of diversity jurisdiction. In nearly all cases, one of the parties would prefer a federal forum, with the consequence that where a class representative or plaintiff in a multi-plaintiff case satisfies § 1332, that case will end up in federal court. [Exxon Br. at 32]

In fact, Congress passed the Act precisely because it determined such arguments are untrue. In the extensive Senate and House Committee Reports on the substantially identical bills that immediately preceded those passed, S.R. Rep. No. 108-123 at n. 22-40, 2003 WL 21811251; H.R. Rep. No. 108-144 (2003), 2003 WL 21321526, Congress found that the determination of six of the courts of appeal that § 1367 had overruled *Zahn* had not materially impacted the filing or removal of diversity class actions in federal court. *Id.* Instead, Congress concluded that class action plaintiff lawyers have typically "gamed the system" to avoid supplemental jurisdiction over diversity based class actions by filing their claims in preferred state courts, and, to prevent removal to federal court, framed their pleadings in a manner to avoid creating the original federal subject matter jurisdiction from which supplemental jurisdiction could attach. *Id.*[2]

Thus, it is clear that in abrogating the "no coattails" rule of *Zahn*, § 1367 resulted in only a limited expansion of federal diversity jurisdiction. *See Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (stating rule "one plaintiff may not

2. Exxon has also publicly advanced the view that plaintiff lawyers who bring large multi-state class actions in state court are "gaming the system." At the same time, in this case, Exxon claims that Plaintiffs have chosen the wrong forum. If there are games being played here, it is Exxon's continued procedural machinations intended to delay conclusion of this case.

ride in on another's coattails"). The fundamentally more important precedent restricting federal jurisdiction over diversity class actions was not *Zahn*, but its predecessor, *Snyder v. Harris*, 394 U.S. 332 (1969), which prohibited aggregation of individual class member claims for purposes of satisfying the amount in controversy requirement of the diversity statute. In adopting the Act, Congress has expressly permitted the aggregation *Snyder* prohibited. Act, Section 4, amended subsection (d)(6) to 28 U.S.C. § 1332.

2. Congress Has Dispelled the Notion of its Supposed Antipathy Toward Diversity Jurisdiction

Congress' adoption of the Act also lays to rest Exxon's assertion that § 1367 cannot be read to mean what it says because of Congress' supposed antipathy to diversity jurisdiction:

> This Court has pointed to Congress's consistent choice to cut back on federal diversity jurisdiction . . . [Exxon Br. at 4];
>
> * * *
>
> For decades, Congress has repeatedly limited the federal court's diversity jurisdiction and approved this Court's narrow construction of § 1332. [Exxon Br. at 12];
>
> * * *
>
> For more than a century, Congress has acted to narrow the scope of diversity jurisdiction. See *Snyder*, 394 U.S. at 339. Congress has done so by raising the minimum-amount requirement periodically, and by accepting the Court's restrictive interpretation of § 1332. [Exxon Br. at 31][3]
>
> * * *
>
> [T]he supplemental jurisdiction statute was enacted in response to a perceived threat to federal-question jurisdiction. Congress acted only after *Finley* altered the rules of pendent jurisdiction in a way that threatened severely to limit federal-court adjudication of federal claims, and Congress sought only to restore and codify the rules as they existed *before Finley*.[4] [Exxon Rep. Br. at 11]
>
> * * *

---

3. Upon examination, the evidence of supposed Congressional disfavor of diversity jurisdiction relied upon by Exxon is limited to (1) Congress' periodic increase of the amount in controversy requirement, and (2) Congress' failure to take contrary action when federal courts have narrowly construed the diversity statute. But the former presumes without support that periodic increases to the amount in controversy requirement were something other than gross adjustments for inflation over many intervening years, and the latter presumes knowledge on the part of Congress, pre-*Finley*, that it had the exclusive power to create or alter the jurisdiction of the federal courts.

4. The misconceived notion that § 1367 "restored" the pre-*Finley* rules of pendent party jurisdiction actually contradicts *Finley*, which held that pendent jurisdiction could not be judicially created.

> Indeed, it has been questioned whether there is a continuing need for diversity jurisdiction.[5] [Exxon Rep. Br. at 11]

Exxon's arguments stand in sharp contrast to the express "Findings and Purposes" set forth in Section 2 of the Act:

> (a) FINDINGS – Congress finds the following:
>
> (1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.
>
> * * *
>
> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are –
>
> (A) keeping cases of national importance out of Federal court;
>
> * * *
>
> (b) PURPOSES – The purposes of this Act are to–
>
> (1) assure fair and prompt recoveries for class members with legitimate claims;

5. Exxon's Reply Brief containing this statement was filed on the very day the Congress passed the Act.

> (2) *restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction*; (emphasis added).

In short, far from showing a disinclination to confer diversity jurisdiction, it is quite apparent that, once this Court announced in *Finley* that judicial tinkering with the scope of federal subject matter jurisdiction would no longer be countenanced, Congress has fully embraced the public policy considerations that led to the creation of diversity jurisdiction in the Constitution.

3. As a Result of the Act, Federal Jurisdiction Would be Available in this Case Even if Exxon Prevails on the Question Presented

If the Court were to rule that the district court lacks jurisdiction over the subclass made up of the lesser claimants, the district court would proceed with the provisionally established process of sorting the jurisdictionally sufficient claims from the lesser claims. Pet. App. at 150a. Once identified and dismissed, the lesser class members would be entitled to re-file their claims pursuant to the tolling provisions of § 1367(d).

Because the aggregate amount of the lesser claims is substantially in excess of $5 million, the dismissed claimants would have a number of options including: (1) simply re-filing in federal court pursuant to the jurisdiction provided by the Act, (2) filing one or more class action(s) in state courts (which would be subject to removal by Exxon under Section 5 of the Act), (3) filing individual actions in state or federal

courts, or (4) some combination of all three alternatives. The opt outs from any new class actions could also elect to proceed individually in state court. Unless a non-diverse defendant is joined in any individual claims filed in state court, those claims would also likely be removed to the federal court.

Under any of these permutations, Exxon's liability as established in this action would be subject to summary adjudication by operation of collateral estoppel. In addition, by virtue of this case's exposure of the egregiousness of Exxon's bad faith pricing scheme used to run thousands of dealers out of business without exercising PMPA rights, Exxon would be subject to further potential liability on additional state and federal claims, including state law claims for punitive damages.

CONCLUSION

Congress expressly emphasized in the Act its desire to "assure fair and prompt recoveries for class members with legitimate claims." Act, Section 2(a)(1). Plaintiffs filed this action in the proper forum pursuant to the supplemental jurisdiction statute and Exxon's ongoing efforts to frustrate that policy through further delay in the final resolution of this case should be denied.

Respectfully submitted,

SIDNEY M. PERTNOY
PERTNOY SOLOWSKY
& ALLEN, P.A.
150 West Flagler Street
2000 Museum Tower
Miami, FL 33130
(305) 371-2223

EUGENE E. STEARNS*
STEARNS WEAVER MILLER
WEISSLER ALHADEFF
& SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, FL 33130
(305) 789-3200

Attorneys for Respondents

* *Counsel of Record*

APPENDIX

APPENDIX

APPENDIX — CLASS ACTION FAIRNESS ACT OF 2005 (ENGROSSED AS PASSED BY SENATE)

109th CONGRESS

1st Session

S. 5

AN ACT

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) SHORT TITLE- This Act may be cited as the 'Class Action Fairness Act of 2005'.

(b) REFERENCE- Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS- The table of contents for this Act is as follows:

Appendix

Sec. 1. Short title; reference; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.

Sec. 4. Federal district court jurisdiction for interstate class actions.

Sec. 5. Removal of interstate class actions to Federal district court.

Sec. 6. Report on class action settlements.

Sec. 7. Enactment of Judicial Conference recommendations.

Sec. 8. Rulemaking authority of Supreme Court and Judicial Conference.

Sec. 9. Effective date.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS- Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

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(2) Over the past decade, there have been abuses of the class action device that have—

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

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(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES- The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

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SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL- Part V is amended by inserting after chapter 113 the following:

'CHAPTER 114—CLASS ACTIONS

'Sec.

'1711. Definitions.

'1712. Coupon settlements.

'1713. Protection against loss by class members.

'1714. Protection against discrimination based on geographic location.

'1715. Notifications to appropriate Federal and State officials.

'Sec. 1711. Definitions

'In this chapter:

'(1) CLASS- The term 'class' means all of the class members in a class action.

'(2) CLASS ACTION- The term 'class action' means any civil action filed in a district court of the United

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States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

'(3) CLASS COUNSEL- The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

'(4) CLASS MEMBERS- The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

'(5) PLAINTIFF CLASS ACTION- The term 'plaintiff class action' means a class action in which class members are plaintiffs.

'(6) PROPOSED SETTLEMENT- The term 'proposed settlement' means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

'Sec. 1712. Coupon settlements

'(a) CONTINGENT FEES IN COUPON SETTLEMENTS- If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

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'(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS-

'(1) IN GENERAL- If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

'(2) COURT APPROVAL- Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

'(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS- If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—

'(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

'(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

'(d) SETTLEMENT VALUATION EXPERTISE- In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

'(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS- In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

'Sec. 1713. Protection against loss by class members

'The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class

member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

'Sec. 1714. Protection against discrimination based on geographic location

'The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

'Sec. 1715. Notifications to appropriate Federal and State officials

'(a) DEFINITIONS-

'(1) APPROPRIATE FEDERAL OFFICIAL- In this section, the term 'appropriate Federal official' means—

'(A) the Attorney General of the United States; or

'(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act

(12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

'(2) APPROPRIATE STATE OFFICIAL- In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

'(b) IN GENERAL- Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

'(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be

served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

'(2) notice of any scheduled judicial hearing in the class action;

'(3) any proposed or final notification to class members of—

'(A)(i) the members' rights to request exclusion from the class action; or

'(ii) if no right to request exclusion exists, a statement that no such right exists; and

'(B) a proposed settlement of a class action;

'(4) any proposed or final class action settlement;

'(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

'(6) any final judgment or notice of dismissal;

'(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

'(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

'(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

'(c) DEPOSITORY INSTITUTIONS NOTIFICATION-

'(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS- In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

'(2) STATE DEPOSITORY INSTITUTIONS- In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required

under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

'(d) FINAL APPROVAL- An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

'(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED-

'(1) IN GENERAL- A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

'(2) LIMITATION- A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that

has primary regulatory, supervisory, or licensing authority over the defendant.

'(3) APPLICATION OF RIGHTS- The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

'(f) RULE OF CONSTRUCTION- Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.'.

(b) TECHNICAL AND CONFORMING AMENDMENT- The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

1711'.

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.

1. (a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION- Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

'(d)(1) In this subsection—

'(A) the term 'class' means all of the class members in a class action;

'(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

'(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

'(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

'(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

'(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

'(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

'(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

'(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

'(A) whether the claims asserted involve matters of national or interstate interest;

'(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

'(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

'(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

'(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

'(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

'(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

'(A)(i) over a class action in which—

'(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

'(II) at least 1 defendant is a defendant—

'(aa) from whom significant relief is sought by members of the plaintiff class;

'(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

'(cc) who is a citizen of the State in which the action was originally filed; and

'(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

'(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

'(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

'(5) Paragraphs (2) through (4) shall not apply to any class action in which—

'(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

'(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

'(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

'(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date

of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

'(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

'(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

'(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

'(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

'(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

'(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

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'(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

'(B)(i) As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

'(ii) As used in subparagraph (A), the term 'mass action' shall not include any civil action in which—

'(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

'(II) the claims are joined upon motion of a defendant;

'(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

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'(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

'(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

'(ii) This subparagraph will not apply—

'(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

'(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

'(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.'.

(b) CONFORMING AMENDMENTS-

(1) Section 1335(a)(1) is amended by inserting 'subsection (a) or (d) of' before 'section 1332'.

(2) Section 1603(b)(3) is amended by striking '(d)' and inserting '(e)'.

Appendix

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL- Chapter 89 is amended by adding after section 1452 the following:

'Sec. 1453. Removal of class actions

'(a) DEFINITIONS- In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d)(1).

'(b) IN GENERAL- A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

'(c) REVIEW OF REMAND ORDERS-

'(1) IN GENERAL- Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

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'(2) TIME PERIOD FOR JUDGMENT- If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

'(3) EXTENSION OF TIME PERIOD- The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

'(A) all parties to the proceeding agree to such extension, for any period of time; or

'(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

'(4) DENIAL OF APPEAL- If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

'(d) EXCEPTION- This section shall not apply to any class action that solely involves—

'(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

'(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

'(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).'.

(b) TECHNICAL AND CONFORMING AMENDMENTS- The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

'1453. Removal of class actions.'.

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL- Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT- The report under subsection (a) shall contain—

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements

are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that--

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS- Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.

Notwithstanding any other provision of law, the amendments to rule 23 of the Federal Rules of Civil Procedure, which are set forth in the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the date of enactment of this Act or on December 1, 2003 (as specified in that order), whichever occurs first.

Appendix

SEC. 8. RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE.

Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure under chapter 131 of title 28, United States Code.

SEC. 9. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

Supreme Court U.S.
FILED
JAN 18 2005
OFFICE OF THE CLERK

No. 04-70

In the Supreme Court of the United States

EXXON MOBIL CORPORATION, PETITIONER

v.

ALLAPATTAH SERVICES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the supplemental jurisdiction statute, 28 U.S.C. 1367, authorizes federal courts with diversity jurisdiction over the individual claims of named plaintiffs to exercise supplemental jurisdiction over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement.

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INTEREST OF THE UNITED STATES

This case concerns the proper scope of the supplemental jurisdiction statute, 28 U.S.C. 1367. In keeping with Congress's dual purposes in enacting the diversity and supplemental jurisdiction statutes, the United States has a significant interest in assuring a neutral federal forum for the adjudication of substantial disputes between persons of diverse citizenship and promoting the efficient resolution of disputes by permitting related claims to be resolved in one action. More broadly, the rules governing the joinder of parties and claims, particularly in class actions such as this one, have enormous consequences for the federal courts and interstate commerce. The United States has previously participated as amicus curiae in cases raising similar issues to those presented in this case and in *del Rosario Ortega* v. *Star-Kist Foods, Inc.*, No. 04-79. See, *e.g.*, *Ford Motor Co.* v.

McCauley, 537 U.S. 1 (2002); *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002). The United States has also previously participated in cases addressing the proper scope of the supplemental jurisdiction statute. See *Jinks* v. *Richland County*, 538 U.S. 456 (2003); *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533 (2002).

STATEMENT

1. a. Under the federal diversity jurisdiction statute, 28 U.S.C. 1332, the federal district courts have jurisdiction over civil actions when two conditions are met. First, there must be diversity of citizenship. *Ibid.* In *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806), this Court held that the statute requires "complete" diversity of citizenship, *i.e.*, that no plaintiff may have the same citizenship as any defendant in the case. In the class-action context, however, this Court has held that the requirement of complete diversity applies only to the named plaintiffs. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921).

Second, the matter in controversy must exceed a specified amount, now $75,000. 28 U.S.C. 1332. That amount-in-controversy requirement has long been understood to forbid aggregation of claims when none of the plaintiffs satisfies the jurisdictional amount. See *Zahn* v. *International Paper Co.*, 414 U.S. 291, 294-295 & nn.3 & 4 (1973) (citing cases). This Court has interpreted Section 1332 to require "that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts." *Id.* at 294. Thus, while district courts sitting in diversity have jurisdiction over cases in which at least one of the plaintiffs presents claims exceeding $75,000, parties whose claims do not meet that jurisdictional amount must be dismissed. See *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 590 (1939). In *Zahn*, this Court held that *Clark* applies in the class-action context as well; thus, Section 1332 does not authorize jurisdiction over a plaintiff, named or unnamed, in

a Rule 23(b)(3) class action whose claim does not satisfy the amount-in-controversy requirement. See *Zahn*, 414 U.S. at 300-301.

b. The supplemental jurisdiction statute authorizes federal district courts to exercise jurisdiction over claims that would not, standing alone, come within a district court's original jurisdiction, but that are so related to claims within the court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. See 28 U.S.C. 1367(a). The statute was enacted as part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, in response to decisions of this Court delineating the doctrines of pendent and ancillary jurisdiction. See H.R. Rep. No. 734, 101st Cong., 2d Sess. 27-29 (1990); *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 165 (1997).

In *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), this Court held that district courts, when adjudicating federal-law claims within their subject-matter jurisdiction under 28 U.S.C. 1331, may also adjudicate state-law claims over which they would not otherwise have jurisdiction, if the federal-law and state-law claims "derive from a common nucleus of operative fact" and thus constitute "but one constitutional 'case'" under Article III. 383 U.S. at 725 (citation omitted). Thereafter, in a series of decisions, this Court identified various limits on a district court's ability to adjudicate claims that, although not independently within its subject-matter jurisdiction, were related to claims within its jurisdiction. See, *e.g.*, *Aldinger* v. *Howard*, 427 U.S. 1 (1976); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978).

In *Finley* v. *United States*, 490 U.S. 545 (1989), this Court held, in a suit in which original jurisdiction was based on the Federal Tort Claims Act, that the federal district courts may not exercise jurisdiction over pendent parties in the absence of congressional authorization. *Id.* at 546, 556. This Court noted, however, that "[w]hatever we say regarding the

scope of jurisdiction conferred by a particular statute can of course be changed by Congress." *Ibid.*

Congress responded to *Finley* by enacting 28 U.S.C. 1367, which provides express congressional authorization for both pendent-claim and pendent-party jurisdiction. See *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 539-540 (2002). Section 1367(a) confers supplemental jurisdiction "over all other claims" that form part of the same case or controversy over which the district court has original jurisdiction, "[e]xcept as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute." 28 U.S.C. 1367(a). Subsection (b) delineates specific exceptions to the exercise of supplemental jurisdiction when original jurisdiction is founded solely on diversity jurisdiction under 28 U.S.C. 1332 and when "exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." 28 U.S.C. 1367(b). A district court also may decline to exercise supplemental jurisdiction over a claim in various circumstances, such as when "the claim raises a novel or complex issue of State law" or when "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." See 28 U.S.C. 1367(c)(1) and (2).

2. This case arose from petitioner's implementation of a marketing program known as the Discount for Cash (DFC) program, through which it encouraged its retail dealers to charge their customers who paid by credit card a higher price for gasoline than their customers who paid in cash. Pet. App. 69a. In 1991, several dealers brought this action against petitioner, asserting *inter alia* that petitioner breached its contracts with respect to the DFC program by overcharging them for gasoline. *Id.* at 69a-70a; J.A. 1. The dealers sought to represent a class of approximately 10,000 similarly situated current and former dealers, Pet. App. 69a-70a, and in 1996, the district court granted their motion for class certification, *id.* at 220a-221a. In 1999, the district

court held that it possessed supplemental jurisdiction over the claims of class members that failed to independently satisfy the jurisdictional amount, *id.* at 212a-214a.

After two jury trials, respondents obtained a favorable verdict. Pet. App. 70a. During post-trial proceedings, the district court certified two questions for interlocutory appeal under 28 U.S.C. 1292(b), including whether the court properly exercised supplemental jurisdiction over the claims of class members that did not meet the amount-in-controversy requirement of Section 1332. Pet. App. 70a.

3. In a unanimous opinion, the court of appeals affirmed. Pet. App. 67a-92a. On the supplemental-jurisdiction question, the court began its statutory analysis by observing that "it is clear from the plain language of the statute that § 1367(a) is a general grant of supplemental jurisdiction, which is then narrowed for diversity cases by § 1367(b)." *Id.* at 74a (footnote omitted). The court noted the parties' agreement that the district court had original jurisdiction over the claims of the class representatives because those claims satisfied Section 1332's amount-in-controversy requirement. *Id.* at 75a. And it concluded that, because the claims of the unnamed class members "arose from the same agreements and contractual obligations as the class representatives' claims, the requirements of § 1367(a) were satisfied." *Ibid.* In addition, the court explained, "[t]he fact that Congress created explicit exceptions to § 1367(a)'s broad grant of supplemental jurisdiction [in § 1367(b)] but did not include Rule 23 among them leads us to conclude that it did not intend to prevent district courts from exercising supplemental jurisdiction over the claims of class members." *Id.* at 76a. Accordingly, the court held that Section 1367 "clearly and unambiguously provides district courts with the authority in diversity class actions to exercise supplemental jurisdiction over the claims of class members who do not meet the minimum amount in controversy as long as the

district court has original jurisdiction over the claims of at least one of the class representatives." *Id.* at 77a.

The Eleventh Circuit denied a petition for rehearing en banc. Pet. App. 1a-2a. Judge Tjoflat, joined by Judge Birch, dissented from denial of rehearing en banc, expressing the view that Section 1367 did not authorize supplemental jurisdiction over the claims of unnamed class members that do not meet the amount-in-controversy requirement. See *id.* at 2a-66a.

SUMMARY OF ARGUMENT

The plain text of Section 1367 resolves this case. Section 1367(a) confers supplemental jurisdiction over "all other claims" that are related to claims over which the district court has original jurisdiction. 28 U.S.C. 1367(a). Here, the district court has original jurisdiction over the named plaintiffs' claims, and it is undisputed that the claims of the unnamed plaintiffs are related to those claims and that none of the statutory exceptions applies. The text of Section 1367 therefore compels the conclusion that the district court may exercise supplemental jurisdiction over the unnamed plaintiffs' claims.

In arguing against that plain reading, petitioner contends that to have the requisite "original jurisdiction" in a diversity case, the district court must have original jurisdiction over the claims of *all* of the plaintiffs, including those of the class members who seek to invoke the court's supplemental jurisdiction. But "[t]he whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 167 (1997). Petitioner's interpretation of Section 1367 cannot be squared with the statutory text or the basic theory of the *supplemental* jurisdiction statute as acknowledged in *City of Chicago*. Moreover, petitioner bases its reasoning on the incorrect premise that the presence of plaintiffs who do not meet the amount-in-controversy requirement destroys *ab initio* the district court's jurisdiction to decide the claims of the plaintiffs who do meet the requisite jurisdictional amount. In fact, as this Court made clear in both *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 589-600 (1939), and *Zahn* v. *International Paper Co.*, 414 U.S. 291, 295-296 (1973), courts have original jurisdiction over the claims of plaintiffs whose claims meet the amount-in-controversy requirement, even while the plaintiffs whose claims are insufficient remain in the suit.

Nor does the class-action nature of this suit take the unnamed plaintiffs' claims outside Section 1367(a). While the class-action distinctions to which petitioner points may explain the protections of Rule 23, they say nothing about whether those claims fall within the terms of the supplemental jurisdiction statute. In fact, the law has been more lenient with respect to the requirements for diversity jurisdiction in class actions than in traditional joinder cases. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 365-367 (1921).

Moreover, petitioner's explanation of Section 1367(a) cannot be squared with Section 1367(b), in which Congress provided very specific exceptions to the grant of supplemental jurisdiction in the particular context of diversity cases and specifically addressed claims by certain additional plaintiffs. 28 U.S.C. 1367(b). Dispositively, none of those exceptions applies to claims of unnamed plaintiffs asserted pursuant to Rule 23. 28 U.S.C. 1367(b). Petitioner's reading of "original jurisdiction" in Section 1367(a) would render superfluous those carefully delineated exceptions.

Finally, reading the statute by its plain terms will not result in absurd consequences, as posited by petitioner. The limitations that Congress expressly incorporated into Section 1367(b) largely preserve the traditional rules of diversity jurisdiction. Furthermore, the lines drawn by Congress reflect its judgments regarding the efficiency of allowing

related claims to be tried together in one action when the federal court undeniably has jurisdiction over the named plaintiffs' claims. This Court should reject petitioner's attempts—through its resort to supposed "rules" of statutory construction and unpersuasive legislative history—to substitute a different policy judgment.

ARGUMENT

WHEN THE CLAIMS OF THE NAMED PLAINTIFFS IN A CIVIL DIVERSITY CLASS ACTION SATISFY THE REQUIREMENTS OF DIVERSITY JURISDICTION, SECTION 1367 CONFERS SUPPLEMENTAL JURISDICTION OVER THE RELATED CLAIMS OF UNNAMED PLAINTIFFS WITHOUT REGARD TO THE AMOUNT IN CONTROVERSY

A. The Plain Text Of Section 1367 Confers Supplemental Jurisdiction Over The Related Claims Of Unnamed Plaintiffs That Do Not Satisfy The Amount-In-Controversy Requirement

The task of divining the meaning of the supplemental jurisdiction statute "begins where all such inquiries must begin: with the language of the statute itself. * * * In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citations and internal quotation marks omitted); accord *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Here, the plain terms of Section 1367 confer supplemental jurisdiction over the claims of unnamed plaintiffs that do not independently meet the amount-in-controversy requirement.

Section 1367(a) provides in part that:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. 1367(a). It then underscores the breadth of that grant of jurisdiction, stating that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." *Ibid.* Accordingly, under the terms of the statute, the district court has supplemental jurisdiction over the claims of unnamed plaintiffs that do not satisfy the amount-in-controversy requirement as long as: (1) the district court has original jurisdiction over the action, (2) the unnamed plaintiffs' claims are part of the same case or controversy, and (3) none of the statutory exceptions to supplemental jurisdiction applies.

It is undisputed that the second and third of those elements are met here; the unnamed plaintiffs' claims clearly derive from "a common nucleus of operative fact," *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966), and claims asserted pursuant to Rule 23 are not included among the exceptions to supplemental jurisdiction established by Congress in Section 1367(b). The only remaining question, therefore, is whether the district court had "original jurisdiction" so as to permit the exercise of supplemental jurisdiction over the claims of additional parties. That question must be answered in the affirmative.

1. *The district court had original jurisdiction over this action*

The district court unquestionably possessed original jurisdiction, under 28 U.S.C. 1332, over the named plaintiffs' civil action against petitioner. Complete diversity of citizenship between the named plaintiffs and petitioner is not in dispute, and petitioner concedes that the claims of the named plaintiffs satisfy the amount-in-controversy requirement for diversity jurisdiction. See Pet. i, 2; Pet. App. 75a ("The parties agree that the district court had original jurisdiction over the class representatives' claims, because they satisfied the [then-applicable] $50,000 jurisdictional minimum amount in controversy requirement.") (footnote omitted).

Petitioner nonetheless asserts (Pet. Br. 16-17, 21-24) that the district court lacked "original jurisdiction" over this "civil action" because the inclusion of claims by unnamed class members that do not satisfy the amount-in-controversy requirement purportedly operates to "destroy" *ab initio* the court's jurisdiction over the case as a whole, including even the claims of named plaintiffs that do satisfy that requirement. Petitioner's arguments rest on a faulty reading of the statutory text coupled with mistaken premises about the background law, and ultimately are contrary to the whole point of the supplemental jurisdiction statute.

a. By asserting that Section 1367(a) requires the district court to have "original jurisdiction" over the claims of *all* the plaintiffs, including the class members who seek to invoke supplemental jurisdiction, petitioner improperly collapses the original jurisdiction inquiry into the supplemental jurisdiction inquiry. This Court squarely rejected that approach in *City of Chicago*. In that case, the City of Chicago removed to federal court two state-court lawsuits that presented federal-law claims along with state-law claims over which there was no independent basis for federal jurisdiction. 522 U.S. at 160-161. The plaintiffs challenged the

existence of federal jurisdiction, asserting that the district court had to have "original jurisdiction" not simply over the federal claims, but over the state-law claims as well. *Id.* at 166-167.[1] The Court had little difficulty rejecting that argument, concluding that the district court had jurisdiction over *all* of the claims because the court had "original jurisdiction" over the federal-law claims under 28 U.S.C. 1331, and "supplemental jurisdiction" over the accompanying state-law claims under 28 U.S.C. 1367. 522 U.S. at 163-167. In so holding, the Court made clear that, as long as the district court possessed original jurisdiction over *some* of the claims asserted in the case, it possessed "original jurisdiction" over the "civil action." *Id.* at 166. Accordingly, "the relevant inquiry" respecting the accompanying claims was "whether they fall within a district court's supplemental jurisdiction, not its original jurisdiction." *Id.* at 167.

As the Court explained, moreover, the contrary interpretation urged by the plaintiffs there "would effectively read the supplemental jurisdiction statute out of the books: The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *City of Chicago*, 522 U.S. at 167. Similarly, here, "if each and every plaintiff in a diversity case must satisfy § 1332's requirements of complete 'diversity' and 'matter in controversy,' * * * then there remains no supplemental jurisdiction in a diversity action for district courts to exercise." *Rosmer* v. *Pfizer, Inc.*, 263 F.3d 110, 120 (4th Cir. 2001) (citation omitted), cert. dismissed, 536 U.S. 979 (2002).

City of Chicago thus forecloses petitioner's assertion that Section 1367(a)'s use of the phrase "civil action" means that the court must have original jurisdiction over the entire ac-

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[1] Although *City of Chicago* involved removal, "[t]he propriety of removal * * * depend[ed] on whether the case originally could have been filed in federal court." 522 U.S. at 163.

tion and "not just over a particular claim or claims." Pet. Br. 22. That assertion is also inconsistent with this Court's jurisprudence construing when jurisdiction exists over a "civil action[]" pursuant to Section 1332. 28 U.S.C. 1332(a). With respect to Section 1332's amount-in-controversy requirement, the Court has consistently held that whether jurisdiction exists over a "civil action[]" is determined on a plaintiff-by-plaintiff basis by looking separately to the amount of each plaintiff's claims, rather than by aggregating the claims of all the plaintiffs in the case. *Zahn*, 414 U.S. at 294-295; see, *e.g.*, *Oliver* v. *Alexander*, 31 U.S. (6 Pet.) 143, 147 (1832). There is no basis for construing "civil action" differently in the context of Section 1367.

The flaws in petitioner's reading of the statute are further underscored by the first sentence of Section 1367, which makes clear that original jurisdiction is judged on the basis of a subset of the claims in the case, not on the case in its entirety. That sentence provides that "in any civil action of which the district courts have original jurisdiction," supplemental jurisdiction can be exercised over "*other* claims." 28 U.S.C. 1367(a) (emphasis added). The latter clause compels the conclusion that the claims over which supplemental jurisdiction is to be exercised need not be within the district court's "original jurisdiction" and that the requirement of having original jurisdiction over a civil action is satisfied as long as any claim falls within the court's original jurisdiction. 28 U.S.C. 1367(a). As Judge Wilkinson observed, reading "'original jurisdiction' over a 'civil action' [to] mean[] that the district court must have original jurisdiction over the *entire* action at the initiation of the complaint," as petitioner does, "would render the phrase 'over all other claims that are so related to claims in the action within such original jurisdiction' virtually superfluous." *Rosmer*, 263 F.3d at 116 (quoting 28 U.S.C. 1367(a)).

b. In an effort to avoid the inevitable consequences of the statutory text, petitioner argues (Pet. Br. 22-24) that *City of Chicago* is inapposite in the diversity context and that, whatever the rule may be in federal-question cases, the presence of putative or actual class members whose claims do not meet the amount-in-controversy requirement destroys "original jurisdiction" to adjudicate the claims of parties that do satisfy the jurisdictional amount. Petitioner cites no authority for that proposition, however, and for good reason, because this Court's precedents directly refute it.

To be sure, it is generally true that "one claim against one *nondiverse* defendant destroys * * * original jurisdiction," Pet. Br. 22 (quoting *Wisconsin Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 389 (1998)) (emphasis added), although that "complete diversity" rule is inapplicable to unnamed plaintiffs in a class action. See *Ben-Hur*, 255 U.S. at 365-367.[2] But it is plainly *not* true that the presence of an unnamed (or named) plaintiff whose claim fails to meet the *amount-in-controversy* requirement destroys jurisdiction over the entire action. Pet. Br. 9-10, 21, 23, 27. In fact, the law is squarely to the contrary, as has been clear at least since this Court's decision in *Clark*.

In *Clark*, this Court ruled on the merits of the claim of the party that satisfied the jurisdictional amount, *before* remanding for dismissal of the other parties' claims over which jurisdiction was lacking. 306 U.S. at 589-600. As this Court explained in *Zahn*: "Upon ascertaining on its own motion that only one of the plaintiffs in the District Court had presented a claim satisfying the jurisdictional amount, the Court [in *Clark*] reached the merits of that claim but directed the District Court to dismiss the claims of all other plaintiffs for want of jurisdiction." *Zahn*, 414 U.S. at 295-296. While *Clark* required "dismissal of those litigants whose claims do

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[2] Regarding the presence of a dispensable nondiverse named plaintiff, a court may correct the jurisdictional defect nunc pro tunc by dismissing the nondiverse plaintiff, and thereby exercise jurisdiction over the remainder of the suit. See, *e.g.*, *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 835-836 (1989).

not satisfy the jurisdictional amount," *id.* at 295, it made clear that the presence of such parties does not affect a court's jurisdiction to adjudicate the claims of other parties whose claims do satisfy the jurisdictional amount.

Petitioner thus errs in contending that "[i]f a plaintiff who fails to meet the jurisdictional minimum is part of a suit, the court's original jurisdiction is destroyed unless and until that plaintiff is dismissed." Pet. Br. 23. Instead, the named plaintiffs' claims are not meaningfully distinguishable from the federal-law claims in *City of Chicago*. Just as "[t]hose federal claims suffice[d] to make the actions 'civil actions' within the 'original jurisdiction' of the district courts" despite the existence of the accompanying state-law claims, 522 U.S. at 166, so too do the named plaintiffs' claims suffice to establish the district court's original jurisdiction over this action.[3]

2. *The class-action nature of this suit supports, rather than undermines, the exercise of supplemental jurisdiction*

Petitioner seeks to avoid the clear import of the statutory text by contending that class actions are so "fundamentally different" from other cases in which parties join together as plaintiffs that Section 1367(a) should not be read to apply to class actions. Pet. Br. 17-20. But while the "differences" to which petitioner points—such as the "potential to bind individuals to a litigated result even though those indi viduals take no part in the litigation" (*id.* at 18)—serve to explain the protections afforded by the requirements of Rule

[3] Petitioner's effort to create a special exception for diversity cases is also inconsistent with the structure of Section 1367 and the text of Section 1367(b). Congress recognized that diversity cases raise some unique concerns and addressed those concerns in Section 1367(b). Even petitioner concedes that Section 1367(b) does not exempt the claims of plaintiffs brought into the suit through Rule 23, and there is no basis for supplementing the statutory exceptions of Section 1367(b) with a non-statutory exception. See pp. 18-20, *infra*.

23, they have nothing to say about whether there is *jurisdiction* over the claims of class members under Section 1367. Indeed, all of the characteristics of class actions to which petitioner points apply equally to the claims of class members that *do* meet the jurisdictional amount, yet petitioner concedes there is jurisdiction over those claims. *Id.* at 20-21 n.7.

The nature of class actions operates to foreclose petitioner's argument tl t the existence of the class allegations in the complaint deprived the court of "original jurisdiction" at the time of filing. See, *e.g.*, Pet. Br. 16-17. As long as the named plaintiffs are completely diverse from the defendants and the claims of each named plaintiff meet the amount-in-controversy requirement (as petitioner concedes is true here, see Pet. i, 2; Pet. App. 75a), the district court has *original* jurisdiction at the time the suit is filed over *all* the claims that are then in the action—that is, the named plaintiffs' claims. Although, as petitioner contends (Pet. Br. 17-18), some protections are afforded the putative class members upon the initiation of a putative class action, the suit actually contains only the claims of the named plaintiffs—"[i]t does not become a class action until certified by the district court." *Gibson* v. *Chrysler Corp.*, 261 F.3d 927, 937 (9th Cir. 2001), cert. denied, 534 U.S. 1104 (2002). The text of Rule 23 makes that clear, by requiring an express certification order by the district court. See Fed. R. Civ. P. 23(c)(1).[4] Thus, even under petitioner's interpretation of Section 1367(a), the district court here possessed "original jurisdiction" over the entire "civil action" at the time of its filing.

[4] That conclusion is further supported by recent amendments to Rule 23, which confirm that, before class certification, the named plaintiffs can settle the suit without approval from the district court, see Fed. R. Civ. P. 23(e)(1)(A); 2003 Advisory Comm. Notes Rule 23(e)(1)(A)—just like any plaintiff in a suit not purporting to be a putative class action.

In any event, and more importantly, the distinctions regarding class actions to which petitioner points do nothing to take the claims of putative or actual class members outside the text of Section 1367(a). As explained above, the only question under Section 1367(a) is whether the claims for which supplemental jurisdiction is sought are "so related to claims in the action * * * that they form part of the same case or controversy," 28 U.S.C. 1367(a)—a requirement indisputably met here. See pp. 9-10, *supra*. And, contrary to petitioner's assertion (Pet. Br. 20), the last sentence of Section 1367(a) provides no basis for excluding the claims of unnamed plaintiffs. That sentence provides that supplemental jurisdiction "shall include" claims involving the joinder or intervention of additional parties. 28 U.S.C. 1367(a). As the use of "include" indicates, that plainly is not an exhaustive listing of the scope of supplemental jurisdiction. See *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); see also, *e.g.*, *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 74 (2002); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 170 n.18 (1977). Indeed, the text of subsection (b) precludes the inference of exclusivity that petitioner seeks to draw, because it makes clear that supplemental jurisdiction also encompasses claims asserted by means of impleader under Rule 14, even though "impleader" is not mentioned in the last sentence of subsection (a). See 28 U.S.C. 1367(b).[5]

[5] In any event, class actions can properly be viewed as a form of "joinder * * * of additional parties." 28 U.S.C. 1367(a). Although class actions are appropriate only when joining each class member as a *named* party is "impracticable," Pet. Br. 19 (quoting Fed. R. Civ. P. 23(a)), it would blink reality not to recognize that Rule 23 provides "a procedural device for joining parties." 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.02, at 23-27 (3d ed. 2004). And it would be anomalous to read the statute to permit supplemental jurisdiction over the claims of all additional plaintiffs who could be joined as named plaintiffs under Rule 20, but to disallow supplemental jurisdiction if there were so many claimants that they could not all practically join as named plaintiffs. It would be particularly anomalous to do so with respect to additional plaintiffs whose claims do not meet the jurisdictional amount, where the addition of more plaintiffs would only increase the total amount in dispute and hence the overall significance of the controversy.

To the extent petitioner suggests (Pet. Br. 20) that the Court should be less willing to extend federal diversity jurisdiction in the class-action context than in other joinder contexts, the law is to the contrary. Since at least 1921, when this Court decided *Supreme Tribe of Ben-Hur* v. *Cauble*, the jurisdictional requirements of Section 1332 have been applied *less* restrictively in the class-action context. In that decision, the Court held that unnamed plaintiffs need not be diverse in citizenship from defendants, as long as the named plaintiffs were completely diverse from all defendants. 255 U.S. 356, 365-367 (1921). In contrast, the law has not been so lenient with respect to plaintiffs joined together under other joinder rules; this Court has read Section 1332 to require that each such plaintiff be diverse from all defendants for there to be original jurisdiction. See, *e.g.*, *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806). To be sure, in *Zahn*, this Court interpreted Section 1332 as not providing *original* jurisdiction over the claims of Rule 23(b)(3) class members whose claims do not independently meet the jurisdictional amount. 414 U.S. at 292, 300-301. But, as this Court subsequently observed in *Finley* v. *United States*, 490 U.S. 545 (1989), Congress can authorize jurisdiction to supplement the original jurisdiction provisions. *Id.* at 556. Section 1367 does precisely that, granting unnamed plaintiffs whose claims do not meet the jurisdictional amount the federal forum that has long been available to class members who are not diverse from defendants.

3. *Section 1367(b) confirms the propriety of supplemental jurisdiction in this case*

Petitioner's proffered interpretation of Section 1367(a) also fails because it cannot be reconciled with Congress's enactment of Section 1367(b), which expressly delineates the exceptions to supplemental jurisdiction in cases in which the district court's original jurisdiction, as in this case, is founded on diversity jurisdiction. Specifically, it provides in full:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14 ["Third-Party Practice"], 19 ["Joinder of Persons Needed for Just Adjudication"], 20 ["Permissive Joinder of Parties"] or 24 ["Intervention"] of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. 1367(b). The text of the statute is thus quite explicit regarding those claims that would otherwise fall within the scope of Section 1367—including claims brought by added plaintiffs—but are nonetheless excluded from supplemental jurisdiction by the terms of Section 1367(b).

Notably, and dispositively for this case, Section 1367(b) does not exclude claims brought under Rule 23. 28 U.S.C. 1367(b); see Pet. App. 76a; *In re Abbott Labs.*, 51 F.3d 524, 528 (5th Cir. 1995) ("Class actions are not among the enumerated exceptions."). Given that Congress expressly chose to exclude from supplemental jurisdiction certain claims brought under Rules 14, 19, 20, and 24, while skipping over

and not excluding claims brought under Rule 23, petitioner's invitation to construe Section 1367 as if Rule 23 appeared in the list of exceptions would violate this Court's "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993).

As the Sixth Circuit observed, "Rule 23 fits in naturally with the other rules listed in § 1367(b). All the rules listed in § 1367(b), like Rule 23, involve different ways of getting additional claims before the court, such as joinder, impleader and intervention." *Olden* v. *LaFarge Corp.*, 383 F.3d 495, 504 n.2 (6th Cir. 2004). That is particularly true because the Section 1367(b) exceptions specifically address claims brought by added plaintiffs—and excludes the claims of plaintiffs proposing to join under Rules 19 and 24, but not Rule 23. The canon *expressio unius est exclusio alterius* thus applies with full force. See, *e.g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (noting that the canon applies when the "items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence").

Further, the statute expressly incorporates the *expressio unius* canon in the language which begins Section 1367(a): "*Except as provided* in subsections (b) and (c) * * * the district courts shall have supplemental jurisdiction." 28 U.S.C. 1367(a) (emphasis added). As the Sixth Circuit concluded, that language "demonstrates that Congress intended the exclusions mentioned in those subsections to be exclusive." *Olden*, 383 F.3d at 504 n.2. It is therefore more than just "notable" (Pet. Br. 20) that Congress did not mention claims joined under Rule 23; it is fatal to petitioner's argument.

Petitioner fails in its attempt to harmonize subsection (b) with its reading of the statute. For example, petitioner appears to read subsection (b) as applying only to subsequently added parties or claims. See, *e.g.*, Pet. Br. 30. Nothing in the

text of the statute, however, supports such a reading. The text of subsection (b) nowhere states—as would have been simple to do—that its exceptions apply only after the initiation of a complaint. Instead, it defines its exceptions in terms of certain rules of civil procedure. The joinder rules, by their terms, apply at the initiation of a case as well as to subsequently added parties and claims. See, *e.g.*, Fed. R. Civ. P. 20(a). For example, persons injured as part of a single bus accident, who join together as plaintiffs to sue, do so pursuant to Rule 20 regardless of whether they file the action together initially or join together subsequent to initiation of the suit. See, *e.g.*, 7 Charles Alan Wright et al., *Federal Practice and Procedure* § 1654 (3d ed. 2001); *United States* v. *Mississippi*, 380 U.S. 128, 142 (1965) (complaint joined multiple parties under Rule 20); *Rosmer*, 263 F.3d at 116. One therefore cannot read subsection (b)'s exclusions as applying only after the initiation of the suit.

Even if one did so, moreover, its exclusions would be superfluous under petitioner's understanding of the law. Under petitioner's view, subsequently added parties or claims that do not meet both of Section 1332's jurisdictional requirements—no less than such parties or claims in the original complaint—destroy the original jurisdiction that is a necessary predicate to supplemental jurisdiction under Section 1367(a). See, *e.g.*, Pet. Br. 23, 27. Under that view, Section 1367(a) would exclude supplemental jurisdiction over any claims that did not satisfy the jurisdictional requirements of Section 1332, Pet. Br. 25—*i.e.*, any claims for which *supplemental*, as opposed to original, jurisdiction could be relevant in a diversity case. Under that view of Section 1367(a), there would have been no need for Congress to parse through the various joinder mechanisms and devise the carefully reticulated and differentiated scheme of exclusions set forth in Section 1367(b). In fact, Congress could have dispensed with subsection (b) altogether.

B. Petitioner's Reliance On Policy Arguments And Legislative History Provides No Basis For Overriding The Plain Language Of The Statute

1. *Applying the statute by its terms does not lead to "absurd consequences"*

Petitioner contends that "if § 1367(a) is interpreted to authorize supplemental jurisdiction over unnamed plaintiffs whose claims do not meet the minimum-amount requirement," Pet. Br. 26, then the statute will have "absurd consequences," including the demise of the "*Strawbridge* rule." *Id.* at 27 (citing *Strawbridge*, 7 U.S. (3 Cranch) at 267-268). Petitioner's concerns are not well-founded.

In the first place, it is far from clear that the plain-language interpretation of Section 1367 would affect the rule announced in *Strawbridge*, which (despite petitioner's suggestion to the contrary (Pet. Br. 27)) relates only to the diversity-of-citizenship requirement. It certainly would have no effect on the claims of unnamed class members; this Court's decision in *Ben-Hur* made the complete diversity rule inapplicable to unnamed plaintiffs. See 255 U.S. at 365-367. And, with respect to plaintiffs joined together under Rule 20, there is a crucial distinction between the complete diversity requirement and the amount-in-controversy requirement, in that the former necessarily applies to the case as a whole, whereas the latter applies on a plaintiff-by-plaintiff basis, *i.e.*, there is no "complete amount-in-controversy" requirement. *Zahn*, 414 U.S. at 294-295; see pp. 12-14, *supra*. When complete diversity is lacking, a district court lacks original jurisdiction over all aspects of the case, but the inability of one plaintiff to meet the amount-in-controversy requirement does nothing to affect the court's jurisdiction over the claims of a co-plaintiff who does satisfy that

requirement.[6] Accordingly, while the issue is not presented here, the Court might well conclude in an appropriate case that, with respect to named parties, the complete diversity requirement survived the enactment of Section 1367 because the joinder of a nondiverse named party (unlike the joinder of a party whose claims fall below the jurisdictional amount) destroys the court's original jurisdiction over the case *as a whole*.

In any event, even if Section 1367 were construed to authorize joinder of nondiverse named parties, it would not make major inroads into *Strawbridge*. As Judge Easterbrook explained, Section 1367(b) draws important lines with respect to protecting the complete-diversity rule. See *Stromberg Metal Works, Inc.* v. *Press Mech., Inc.*, 77 F.3d 928, 932 (7th Cir. 1996). For example, even assuming arguendo that Section 1367(b) might allow claims *by* parties joined under Rule 20 to proceed without regard to diversity of citizenship, claims *against* nondiverse persons made parties under Rule 20 are expressly forbidden. See *ibid.* Thus, the supplemental jurisdiction statute would not allow a citizen of Illinois to sue a citizen of Indiana under the diversity statute and then add a citizen of Illinois as a supplemental defendant. See *ibid.* Likewise, other exceptions in subsection (b) prevent the use of supplemental jurisdiction with respect to nondiverse, indispensable parties—whether plaintiffs or defendants—because subsection (b) does not allow claims *by* or *against* persons who join as necessary parties under Rule 19 or who intervene pursuant to Rule 24 when the joinder would be inconsistent with the requirements of the diversity statute. See 28 U.S.C. 1367(b).[7] "As written, § 1367(b) keeps cases of this kind out of federal court entirely, just as *Strawbridge* does." *Stromberg*, 77 F.3d at 932. Although, as Judge Easterbrook observed, *ibid.*, the wisdom of those lines has been subject to extensive debate, there is no basis for a court to disregard them.

Thus, even if applying the lines drawn by Congress would erode the rule of *Strawbridge* in part, there would be no cause for concern. With respect to absent class members, it would erode nothing, given the longstanding rule of *Ben-Hur*. In the Rule 20 context, the result would simply be that a federal forum would be provided to plaintiffs and defendants in certain instances in which there is minimal rather than complete diversity—the same result that already occurs on a much broader scale in the class-action context.

To be sure, reading the statute by its terms allows supplemental jurisdiction over certain claims not meeting the jurisdictional amount for which there would be no original jurisdiction under *Zahn* and *Clark*. But far from being absurd, Congress's creation of *supplemental* jurisdiction in the circumstances of *Zahn* makes perfect sense and aligns the amount-in-controversy requirement with *Ben-Hur*'s rule regarding the diversity-of-citizenship requirement. The dissent in *Zahn*—as well as the great weight of academic commentary since *Zahn*—recognize the benefits of

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[6] As noted above (note 2, *supra*), the jurisdictional defect created by the joinder of nondiverse parties can in some circumstances be corrected nunc pro tunc so as to preserve the court's ability to resolve the claims of diverse parties. That does not change the fact, however, that the court lacks original jurisdiction over *any* aspect of the case in the absence of such a correction. See *Newman-Green*, 490 U.S. at 827, 836-837 (holding that appellate courts had the authority to dismiss dispensable, nondiverse parties "whose presence spoils statutory diversity jurisdiction" so that the merits of the claims relating to the diverse parties could be decided on appeal); see also *id.* at 840 (Kennedy, J., dissenting) (describing the dismissal of a nondiverse party as "creating jurisdiction where none existed before"). The same is not true when some but not all of the plaintiffs merely fail to satisfy the amount-in-controversy requirement. See pp. 12-14, *supra* (discussing *Clark*).

[7] Those exceptions protect the complete diversity rule in the context in which this Court has suggested that jurisdictional defects cannot even be corrected nunc pro tunc, namely, with respect to claims by or against indispensable parties. Cf. note 2, *supra*; *Horn* v. *Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1873).

allowing supplemental jurisdiction over such claims. See *Zahn*, 414 U.S. at 306-312 (Brennan, J., dissenting) ("[D]enial of ancillary jurisdiction will impose a much larger burden on the state and federal judiciary as a whole, and will substantially impair the ability of the prospective class members to assert their claims."); see also, *e.g.*, Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount In Controversy, and Diversity of Citizenship Class Actions*, 53 Emory L.J. 55, 62-63 (2004) ("[T]he overwhelming weight of academic commentary harshly criticizes *Zahn*.") (footnote omitted). And, with respect to actions involving individual joinder, the rule of *Clark* would be preserved for all of the instances covered by the subsection (b) exceptions. As a leading treatise has observed, when construed in this manner, Section 1367's "extension of supplemental jurisdiction is severely limited in certain diversity cases by subsection (b)," 16 James Wm. Moore, *Moore's Federal Practice* § 106.05[2], at 106-24 (3d ed. 2004) (*Moore's*), and, "[i]n most instances, the statute mirrors prestatutory common law practice," *id.* § 106.40, at 106-55.

Furthermore, this interpretation of Section 1367 would not burden federal district courts with claims that, in the judgment of the district court, ought to be decided elsewhere. Even if the minimum requirements for supplemental jurisdiction are satisfied, Section 1367 expressly provides district courts with discretion to decline to exercise that jurisdiction. 28 U.S.C. 1367(c); see 16 *Moore's* § 106.05[4], at 106-27 ("Subsection (c) of Section 1367 codifies the discretionary factors that justify a refusal to exercise supplemental jurisdiction."). That discretion will protect federal courts from having to resolve claims that raise "novel or complex issue[s] of State law" or that "substantially predominate[]" over the original jurisdiction claims. 28 U.S.C. 1367(c). A district court also can decline to exercise supplemental jurisdiction if it has dismissed the claims over which it has original jurisdiction. 28 U.S.C. 1367(c). Finally,

"in exceptional circumstances," a court can decline to exercise its supplemental jurisdiction if "there are other compelling reasons" for doing so. 28 U.S.C. 1367(c). As this Court recognized in *City of Chicago*, "[t]he statute thereby reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." 522 U.S. at 173 (citation and internal quotation marks omitted).

2. *Affording supplemental jurisdiction here serves the congressional purposes of fostering the efficient resolution of disputes and of providing a neutral federal forum to resolve substantial controversies*

In an attempt to bolster its counter-textual reading of the statute, petitioner points to four alleged "rules" of statutory construction that are actually little more than policy arguments. See Pet. Br. 31-33. As discussed above, however, Congress drew important lines in subsections (b) and (c) that limit Section 1367(a)'s broad grant of supplemental jurisdiction in diversity cases. Those lines reflect Congress's policy judgments and define the federal courts' jurisdiction. As the Court observed in *Finley*, if Congress decides that the plain import of the statutory text is inconsistent with its policy preferences, "the scope of jurisdiction conferred * * * can of course be changed by Congress." *Finley*, 490 U.S. at 556. Section 1367 should therefore be read, as its plain text dictates, to allow supplemental jurisdiction over the claims of class members that do not meet the jurisdictional amount.

Reading the statute in accordance with its terms will further the congressional purposes underlying both Section 1367 and the diversity jurisdiction statute more generally. First, allowing the inclusion of the related claims of unnamed class members whose claims do not meet the jurisdictional

amount promotes the efficient resolution of disputes, both for parties and for the federal and state court systems. Those efficiency benefits are extolled in the legislative history of Section 1367. As the House Report noted, "[s]upplemental jurisdiction has enabled federal courts and litigants to take advantage of the federal procedural rules on claim and party joinder to deal economically—in single rather than multiple litigation—with related matters, usually those arising from the same transaction, occurrence, or series of transactions or occurrences." H.R. Rep. No. 734, *supra*, at 28; *ibid.* ("[T]he district court's exercise of supplemental jurisdiction, by making federal court a practical arena for the resolution of an entire controversy, has effectuated Congress's intent in the jurisdictional statutes to provide plaintiffs with a federal forum for litigating claims within original federal jurisdiction.").[8]

Second, allowing supplemental jurisdiction over the related claims of unnamed plaintiffs that do not meet the jurisdictional amount is consistent with the general purpose of diversity jurisdiction. The purpose of the diversity jurisdiction statute, including its amount-in-controversy requirement, is to provide a neutral federal forum for the adjudication of substantial controversies involving diverse parties. Congress included the amount-in-controversy requirement in the original diversity jurisdiction statute, and subsequently adjusted the amount, to reserve the federal courts' diversity jurisdiction for cases that are relatively substantial in monetary terms. See 15 *Moore's* § 102.109[3], at 102-199. Because original jurisdiction over the claims of at least one

[8] Accord *Report to the Federal Courts Study Committee of the Subcommittee on the Role of Federal Courts and Their Relation to the States* (Mar. 12, 1990), *reprinted in* 1 *Federal Courts Study Committee, Working Papers and Subcommittee Reports* 547 (July 1, 1990) ("Supplemental jurisdiction facilitates the joinder in litigation of all claims arising out of the same transaction. The benefits in judicial economy and in party and witness convenience are apparent.").

plaintiff is a prerequisite to the exercise of supplemental jurisdiction, every diversity case in which supplemental jurisdiction is exercised over an unnamed plaintiff who does not independently satisfy the amount-in-controversy requirement will necessarily entail a substantial controversy. The joinder of additional class members with injuries from the same transaction or occurrence only enhances, rather than detracts from, the significance of the controversy. The supplemental jurisdiction statute will simply allow a neutral federal forum for adjudication of additional claims that are part and parcel of that substantial controversy. See *Stromberg*, 77 F.3d at 932 (noting that the statute's "[c]losely related" requirement is a "vital qualification"). That result creates no cause for concern, and provides no possible justification for overriding the plain text of the statute.[9]

3. *Petitioner's resort to legislative history cannot overcome the plain meaning of the text*

As its last refuge, petitioner looks to legislative history. Given the plain language of Section 1367, however, resort to the statute's legislative history is unnecessary. Pet. App. 30a-32a. As this Court has recognized, "reference to legislative history is inappropriate when the text of the statute is

[9] Contrary to petitioner's argument (Pet. Br. 32-33), that result does not encroach on state sovereignty. Article III authorizes unlimited federal diversity jurisdiction; the amount-in-controversy requirement is not a principle of state sovereignty but rather a congressional policy judgment that certain insignificant monetary claims ought not be brought in federal court (a point underscored by the longstanding amount-in-controversy requirement for federal question cases). Nothing in the statute affects the rule against aggregation—that is, if all of the plaintiffs have claims of insufficient jurisdictional amounts, those claims must be tried in state court. See, *e.g.*, *Snyder* v. *Harris*, 394 U.S. 332 (1969). Even under petitioner's view, state-law claims can be tried in federal court if they satisfy the jurisdictional amount; exercising supplemental jurisdiction simply allows other claims that are part and parcel of the same controversy to be tried at the same time.

unambiguous." *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 132 (2002); see *BedRoc Ltd.* v. *United States*, 124 S. Ct. 1587, 1595 & n.8 (2004).

Petitioner primarily seeks support from several statements in a House Committee Report. Pet. Br. 37-40. Petitioner emphasizes language from the report to the effect that "[i]n diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute." H.R. Rep. No. 734, *supra*, at 28. Petitioner also relies heavily on a sentence stating that the bill did not "intend[] to affect the jurisdictional requirement of 28 U.S.C. § 1332 in diversity-only class actions," with an accompanying footnote citing *Zahn* and *Ben-Hur*. See H.R. Rep. No. 734, *supra*, at 29 & n.17.

The statements relied upon by petitioner cannot be squared with the statutory text. Section 1367(b) forbids inconsistency with the requirements of the diversity statute only in the instances set forth, not in all cases. To give broad effect to those general statements in the legislative history would render the notion of *supplemental* jurisdiction in diversity cases a dead letter. Further, it would render the specifically delineated exceptions set forth in the body of subsection (b) superfluous.

The reference to *Zahn* and *Ben-Hur* is also impossible to reconcile with the text. As one leading commentator has observed, "assuming that Congress did in fact intend to codify both *Ben-Hur* and *Zahn*, there exists no rational construction of the text of the statute that could dictate that result." 16 *Moore's*, at § 106.44, at 106-63. Moreover, the law professors responsible for that snippet of legislative history have admitted that "on its face, section 1367 does not appear to forbid supplemental jurisdiction over claims of class members that do not satisfy section 1332's jurisdictional amount requirement, which would overrule *Zahn*[.] * * * It would have been better had the statute dealt explicitly with this

problem, and the legislative history was an attempt to correct the oversight." Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943, 960 n.90 (1991). That is a considerable understatement. Statutory text cannot be amended in its legislative history.

In any event, the legislative history is considerably less clear than petitioner suggests. The historical record reveals that "some of those involved in drafting § 1367 both knew that the language chosen for § 1367 would overrule *Zahn* and approved of that result on policy grounds." *Gibson*, 261 F.3d at 940. A subcommittee of the Federal Courts Study Committee, which produced a report that was the impetus for the Judicial Improvements Act of 1990, proposed text that, like Section 1367, contained a broad grant of supplemental jurisdiction in subsection (a), followed by exceptions in subsection (b) applicable in diversity cases (with no mention of Rule 23), and a third subsection providing district courts with discretion to decline to exercise supplemental jurisdiction. *Report to the Federal Courts Study Committee of the Subcommitee on the Role of Federal Courts and Their Relation to the States* (Mar. 12, 1990), *reprinted in* 1 *Federal Courts Study Committee, Working Papers and Subcommittee Reports* 567-568 (July 1, 1990). Significantly, the subcommittee, which was chaired by Judge Posner, recognized that the text of its proposal would expand federal jurisdiction beyond that allowed by the result in *Zahn*. See *id.* at 561 n.33.[10] And the subcommittee approved of that result, explaining that the result in *Zahn* "makes little sense" from

[10] Indeed, Judge Posner has concluded that Section 1367 as enacted permits a district court to exercise supplemental jurisdiction over the claims of both named and unnamed plaintiffs that do not satisfy the amount-in-controversy requirement, as long as one plaintiff meets the jurisdictional minimum. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997), cert. denied, 522 U.S. 1153 (1998).

"a policy standpoint." *Ibid.* Contrary to petitioner's contention (Pet. Br. 35), the Federal Courts Study Committee did not reject the subcommittee's proposal. See *Report of the Federal Courts Study Committee* 47-48 (Apr. 2, 1990). And the fact that the subcommittee's proposal is "strikingly similar" to the text of Section 1367 as enacted, *Gibson*, 261 F.3d at 937, lends still further support to the conclusion that Section 1367 allows supplemental jurisdiction over the claims of class members that do not meet the jurisdictional amount.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
Attorneys

JANUARY 2005

APPENDIX

1. Section 1367 of Title 28 of the United States Code provides in relevant part:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

2. Section 1332 of Title 28 of the United States Code provides in relevant part:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

No. 04-70

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IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:

HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 22091
(703) 264-5300

ROBERT N. WEINER
Counsel of Record
MICHAEL C. AUGUSTINI
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Amicus Curiae

192134

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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This brief is filed on behalf of the Product Liability Advisory Council, Inc. as *amicus curiae* in support of respondents, with the written consent of the parties in this matter as well as the consolidated case, *Ortega v. Star-Kist Foods, Inc.*, No. 04-79.[1]

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with over 120 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices.[2] PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of products liability law and that have the potential to affect PLAC's members. PLAC has submitted hundreds of *amicus* briefs in state and federal appellate courts, including this Court. *See, e.g., Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000), which presented the same question posed in this case.

The members of PLAC have a significant interest in the rules governing federal jurisdiction over putative class

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1. Copies of these consents have been filed with the Clerk of the Court. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. This brief addresses the issues presented in this matter and not the *Ortega* case.

2. A list of PLAC's current corporate membership is included as Appendix A to this brief. Although Exxon Mobil Corporation is a member of PLAC, it does not join and has had no role in PLAC's brief.

actions and the removal of such actions to federal courts. In recent years, PLAC members have suffered through an upsurge of state-court class actions. They have gained first-hand experience with varying approaches to class action litigation in state courts, and in particular, with the disparate treatment of class action defendants. They have endured the burdens of hundreds of duplicative class actions in state courts across the country, fenced off from the procedures available in federal court to consolidate those cases in one court. PLAC's experience enables it to offer a valuable perspective on the issues before this Court.

SUMMARY OF ARGUMENT

This Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), rested on non-statutory rules of ancillary and pendent jurisdiction that are no longer valid. Under *Zahn*, a federal court hearing claims against one party generally needed an independent statutory basis to assert jurisdiction over claims against another, even if the new claims were part of the same case and controversy. Congress changed those rules when it enacted 28 U.S.C. § 1367. That statute provided, in plain language, that district courts with original jurisdiction over an action "have supplemental jurisdiction over all other claims" encompassed by the same case or controversy. Lest there be any doubt, Congress made clear that this supplemental jurisdiction included "claims that involve the joinder or intervention of additional parties."

Congress in § 1367 thus displaced the jurisdictional predicates for the formalistic barrier to federal courts erected in *Zahn*. Specifically, by extending supplemental jurisdiction to other claims and other parties, § 1367 jettisoned any requirement that unnamed class members in a class action

under state law allege an injury in excess of the jurisdictional minimum, when the claims of named plaintiffs satisfy the requirements for diversity jurisdiction.

Far from producing an "absurd" result, reading § 1367 to mean what it says in this regard extinguishes a logical inconsistency in the law regarding federal jurisdiction. There is simply no way to reconcile *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) – requiring only the original named plaintiffs to satisfy the diversity of citizenship requirements in 28 U.S.C. § 1332(a) – with *Zahn* – requiring every class member to satisfy the jurisdictional amount threshold set forth in the same sentence of the same subsection.

From the standpoint of judicial administration, enforcing the natural meaning of § 1367 also produces sensible results. For more than a decade, many lower courts have read § 1367 as obviating the need for each class member to satisfy the jurisdictional amount requirement. No floodgates have opened. The limits on diversity jurisdiction have not fallen away. And the federal courts adopting this approach have continued to function as well as their counterparts elsewhere.

Indeed, despite these rulings, out-of-state defendants still face multiple, inconsistent, concurrent class actions in state courts. A few state trial courts have become magnets for large interstate class actions. In fact, one county judge certified 35 classes from 1996 to 1997, compared to 38 for 1997 in the entire federal court system. *See* H.R. Rep. No. 107-370, at 18 (2002). Although many state courts apply class action requirements appropriately and treat foreign defendants fairly, it takes no great feat of imagination to determine why a few county courts garner a radically disproportionate number of

class actions: those courts are not fair forums for out-of-state defendants. The potential for such unfairness is precisely why the Framers established diversity jurisdiction.

In addition, in federal court, class actions asserting the same claims on behalf of overlapping classes may be transferred to one district for coordinated or consolidated proceedings. There is no similar efficient means for adjudicating conflicting and duplicative class actions pending in state courts across the nation.

Courts, commentators, and legislators have increasingly recognized the importance of providing a federal forum to alleviate these problems. That is what § 1367 does. That is what the words of the statute command. That is what Congress intended to accomplish. PLAC urges that the Court allow the provision its natural effect, and spare litigants the burdens imposed by illogical jurisdictional rules.

ARGUMENT

I. The Plain Language Of Section 1367 Authorizes Supplemental Jurisdiction Over The Claims Of All Class Members.

The parties have exhaustively addressed why § 1367 means what it says, or in the view of petitioner, why it does not. PLAC has only a few brief points to add. First, petitioner contends that the statute does not extend to unnamed class members seeking less than $75,000 because a "civil action of which the district courts have *original jurisdiction*" is an essential predicate for supplemental jurisdiction. *See* 28 U.S.C. § 1367(a) (emphasis added); Pet. Brief at 9-10, 21-24. Petitioner contends that "original jurisdiction" in a diversity case is determined by applying 28 U.S.C. § 1332 to all the claims in the complaint.

If the statute confers jurisdiction over all the claims, there is "original jurisdiction." If it covers some but not all the claims, a federal district court does not have "original jurisdiction" in petitioner's view. And without "original jurisdiction," the argument runs, there can be no supplemental jurisdiction. *See* Pet. Brief at 21-24.

In a putative class action, however, the named plaintiffs proceed on behalf of themselves and as "representative parties on behalf of all" class members. Fed. R. Civ. P. 23(a); *see also Hansberry v. Lee*, 311 U.S. 32, 41, 43 (1940) (describing class actions as "representative" suits on behalf of "absent" class members). Unless and until the court certifies a class, the other class members are not parties. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985) (stating that, unlike a typical party to a lawsuit, an absent class member is "not required to do anything"); *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting) (noting that the petitioner in that case had been unwilling to advance "novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*"). Before certification, they are asserting no claims. *See Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 130 (1975) (ordering the dismissal of a putative class action as moot, in the absence of a proper certification of a class, because no controversy remained with respect to the named plaintiffs' claims); *see also Gibson v. Chrysler Corp.*, 261 F.3d 927, 940 (9th Cir. 2001) (stating that a "class action, when filed, includes only the claims of the named plaintiff or plaintiffs. The claims of unnamed class members are added to the action later, when the action is certified as a class under Rule 23."). Before certification, unnamed class members are "rarely" subjected to discovery

and are not bound by court rulings. *Shutts*, 472 U.S. at 810-11.[3] Indeed, before certification, the class members often cannot be identified and have no knowledge of the suit. *Devlin*, 536 U.S. at 10; *Hansberry*, 311 U.S. at 41.

It is particularly inappropriate to treat absent class members as parties before certification where, as here, certification is requested pursuant to Fed. R. Civ. P. 23(b)(3). Under well-settled law, absent class members need not decide whether to bring a separate individual lawsuit, to intervene as a party in the action, or to remain as a member of the putative class *until* there is a certification ruling. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351-52 (1983). As noted, they often do not even know that someone is purporting to litigate claims on their behalf, let alone that they have a right to pursue such claims in a separate lawsuit of their own. That is why, after certification of a Rule 23(b)(3) class, due process *requires* that a court provide each absent class member with an opportunity to opt out of the class. *Shutts*, 472 U.S. at 812; *see also* Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (holding that each class member must be notified of his right to "press his claim separately"). For all these reasons, the appropriate analysis under § 1367 is to determine first whether the court has original jurisdiction over the claims of the named plaintiffs. If so, then upon certification of the class, the court may assert supplemental jurisdiction over the claims of class members.

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3. Lower courts routinely apply this principle. *See, e.g., Chevron USA Inc. v. Sch. Bd. Vermilion Parish*, 294 F.3d 716, 719-20 (5th Cir. 2002); *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1013 n.1 (9th Cir. 2000); *Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 179-80 (3d Cir. 1994).

This analysis is consistent with the treatment of class members in *Zahn*. The Court did not envision that jurisdiction over the claims of *all* class members would evaporate if the claim of any *one* of them fell below the jurisdictional threshold. Rather, the Court held that the class members with claims below the jurisdictional threshold simply would be excluded from the case. *Zahn*, 414 U.S. at 295 (requiring *only* dismissal of "those litigants whose claims do not satisfy the jurisdictional amount"); *accord In re Sch. Asbestos Litig.*, 921 F.2d 1310, 1315 (3d Cir. 1990). In other words, there was original jurisdiction over the claims of some members. But at that time, the case law did not permit the extension of "pendent party" jurisdiction to the claims of others whose claims otherwise did not fall within any jurisdictional grant.

In addition, petitioner seeks to frame the issue here as whether Congress intended to overrule *Zahn*, triggering a search for evidence of Congressional intent zeroing in on that specific precedent. *See* Pet. Brief at 34-40. That is not the appropriate inquiry. The Court in *Zahn* predicated its opinion on the long-standing rule that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts." 414 U.S. at 294. Indeed, years later in *Finley v. United States*, 490 U.S. 545, 551 (1989), the Court, reiterating that rule, specifically identified as the "most significant element of 'posture' or of 'context'" in *Zahn*, the fact "that the added claims involve added parties over whom no independent basis for jurisdiction exists." *See also id.* at 556 ("All of our cases – *Zahn*, *Aldinger*, and *Kroger* – have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties. Our decision today reaffirms that interpretive rule. . . ."). In § 1367, Congress

unequivocally changed that rule, displacing the central predicate for the *Zahn* decision. Under the current statutory scheme, as this Court has stated, the "whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 167 (1997); *see also* H.R. Rep. No. 101-374, 1990 U.S.C.C.A.N. 6860, 6874 (1990) (suggesting that Congress intended the federal courts to be "a practical arena for the resolution of an entire controversy").

The issue for this Court, then, is not whether Congress, in lifting the prohibition against pendent party jurisdiction, formulated a specific intent to overrule *Zahn* or other particular Supreme Court decisions predicated on that bar.[4] Rather, the question is whether this Court, under the changed circumstances, applying the new jurisdictional rule that Congress codified, should reach the same result as in *Zahn*. *See generally Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587-89 (1993); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 238, 241-42 (1970). Given the plain language of the statute, it should not.

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4. That said, several leading treatises have concluded that Congress did overrule *Zahn*. *See*, *e.g.*, 5 James William Moore *et al.*, *Moore's Federal Practice* § 23.63[2][c], at 23-302 to 23-303 (3d ed. 2004) ("The better view is that *Zahn* was overruled by the passage of the supplemental jurisdiction statute."); 13 C. Wright, A. Miller, E. Cooper and R. Freer, *Federal Practice and Procedure* § 3523.1, at 181 (2004 Supp.) ("Section 1367 seems clearly to overturn the result of that case [*Zahn*]."); 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 6.11, at 598 (4th ed. West 2002) (The Act's "overruling of *Zahn* is fully consistent with the reasoning of the Federal Courts Study Committee on whose recommendation the Act was adopted.").

II. Interpreting Section 1367 To Allow Supplemental Jurisdiction Over All Class Members Yields Sensible Results.

Petitioner contends that the "absurd results" flowing from Eleventh Circuit's interpretation of § 1367 "militate strongly" against its adoption, *see* Pet. Brief at 29-30. The argument is contrary to the conclusion of many legal scholars that *Zahn* itself produced absurd results. The requirement in *Zahn* that each class member satisfy the jurisdictional amount requirement is logically incompatible with the holding of *Ben-Hur* that the citizenship of unnamed class members need not be considered in determining diversity jurisdiction.[5] The jurisdictional amount and the diversity of citizenship requirements appear in the same sentence of the same subsection of § 1332. Nothing in the wording of the statute warrants treating them differently. The anomaly created by *Zahn* in doing so anyway undercuts the suggestion that retiring that decision yields absurd results.

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5. *See*, *e.g.*, Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 Emory L.J. 55, 60-61 (Winter 2004) (stating that the holdings of *Zahn* and *Ben-Hur* "cannot be reconciled"); Thomas D. Rowe, *1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 Ind. L.J. 53, 63-64 (Winter 1998) (contrasting the holdings of *Ben-Hur* and *Zahn* and concluding that overruling *Zahn* would produce a more "coherent and workable" jurisdictional scheme); James M. Underwood, *Supplemental Serendipity: Congress' Accidental Improvement of Supplemental Jurisdiction*, 37 Akron L. Rev. 653, 678 (2004) (criticizing *Zahn* for creating this "anomaly" with respect to diversity class actions); Mark C. Cawley, *The Right Result for the Wrong Reasons: Permitting Aggregation of Claims Under 28 U.S.C. § 1367 in Multi-Plaintiff Diversity Litigation*, 73 Notre Dame L. Rev. 1045, 1053-54 (May 1998) (finding "no justification for relaxing the burdens of diversity in *Ben-Hur* while adhering so rigidly to them in *Zahn*").

In any event, as this Court has held again and again, the plain language of the statute controls.[6] Arguments that Congress could not have intended what it clearly said have found little favor. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459-61 (2002) (emphasizing that the Court's "role is to interpret the language of the statute enacted by Congress"); *see also Dept. of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002) (reversing a lower court's determination that a plain reading of a statute would lead to "absurd results" where Congress's policy choices were "reasonable" on their face). If there is any room for the notion that "absurd results" justify abandoning the plain meaning of a statute, the test must be more than a façade for an alternative policy preference. *Barnhart*, 534 U.S. at 461-62 (refusing to "alter the text in order to satisfy the policy preferences" of the adversely affected party); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 13-14 (2000) (reaffirming that the Court does not "sit to assess the relative merits of different approaches" to legislation); *see also Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 118 (4th Cir. 2001) ("It is not our place to balance" the "competing policies" at work in § 1367). In arguing that it was *unwise* for Congress to expand federal jurisdiction, petitioner seeks to substitute its judgment for that of Congress.

Furthermore, to argue that extending supplemental jurisdiction over all class members yields absurd results is to suggest an implausible disregard of their function by the federal appellate courts that approved pendent party jurisdiction under analogous circumstances before *Zahn*.

6. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 1030 (2004); *BedRoc Ltd. v. United States*, 541 U.S. 176, 124 S. Ct. 1587, 1593 (2004); *United States v. Ron Pair Enters. Inc*, 489 U.S. 235, 241 (1989).

See, e.g., Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, 1128 (6th Cir. 1970); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 816-17 (8th Cir. 1969) (Blackmun, J.); *Stone v. Stone*, 405 F.2d 94, 97-98 (4th Cir. 1968); *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149, 153-54 (3d Cir. 1968). It suggests a similar analytical deficit by the Federal Courts Study subcommittee. Its report, authored by subcommittee chairman Judge Richard A. Posner before enactment of § 1367, proposed *rejecting Zahn*. *See* Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and Their Relation to the States (Mar. 12, 1990), *reprinted in* 1 Federal Courts Study Committee, *Working Papers and Subcommittee Reports*, 1, 561 n.33 (1990) (noting that the subcommittee's proposal "would overrule" *Zahn* because the *Zahn* decision "makes little sense" from a policy standpoint).[7]

In fact, as the conclusions of these and other respected authorities indicate, § 1367 logically embodies several

7. Moreover, in connection with its Federal Judicial Code Revision Project, the American Law Institute ("ALI") drafted and approved a proposed revision to § 1367. As explained by the project reporter, Professor John B. Oakley, the ALI's proposal would have accomplished "expressly what some courts have deemed to be the inadvertent result of present § 1367(b), literally construed: supplemental jurisdiction extends to claims by or against unnamed class members for less than the amount in controversy required by § 1332, countermanding the rule" of *Zahn*. John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 Ind. L.J. 25, 44 (Winter 1998); *see also Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 549 n.2 (2002) (citing another article publishing ALI's proposal and noting that Professor Oakley's work was "well-reasoned") (Ginsburg, J.). Apparently, ALI, too, did not find that to be an absurd result.

coherent and reasonable policy choices by Congress. *See supra* n.4 & n.5. First, it is more than plausible that Congress desired a "single class action, even one in diversity, to be resolved in a single judicial setting." *Rosmer*, 263 F.3d at 121. Having class actions resolved in one forum could potentially "improve judicial efficiency and cut the cost of litigation." *Id.* at 118-19; *see also Newberg on Class Actions*, *supra* n.4, at 598 (recognizing that Congress had good reasons to overrule the result in *Zahn*: "[a]chievement of judicial economy with the avoidance of multiplicity of actions is a major objective of class actions."). The promise of improved efficiency swayed Justices Brennan, Douglas, and Marshall in *Zahn*, *see* 414 U.S. at 308 ("It should be a sufficient answer that denial of ancillary jurisdiction will impose a much larger burden on the state and federal judiciary as a whole, and will substantially impair the ability of the prospective class members to assert their claims.") (Brennan, J., dissenting). Courts and commentators have recognized this goal as an important object of the legislation on supplemental jurisdiction. *See In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995) (abolishing the "strictures of *Zahn* is not an absurd result; it would be welcomed by "respected commentators"), *aff'd by an equally divided court*, 529 U.S. 333 (2000) (per curiam); *see also generally Ponce Fed. Bank, F.S.B. v. Vessel "Lady Abby"*, 980 F.2d 56, 58-59 (1st Cir. 1992) (Breyer, C.J.) (allowing a district court to assert pendent party jurisdiction over a non-diverse defendant in a admiralty case seems "eminently fair" and would help "conserve judicial resources").

Further, Congress may have "imputed a bias in state court against certain out-of-state defendants which it sought to counteract by fortifying diversity jurisdiction." *See Rosmer*, 263 F.3d at 121. *See also* Freer, *supra* n.5, 53 Emory L.J. at 64 (characterizing *Zahn* as an "antidiversity decision" but

noting that the "overwhelming consensus, even among some leading figures who would abolish diversity jurisdiction, is that *Zahn* should go"); Cawley, *supra* n.5, 73 Notre Dame L. Rev. at 1076 (applauding Congress's "desire to reduce court congestion and improve access to federal jurisdiction" by passing § 1367). Whether Congress was right or wrong in that conclusion – and PLAC submits that there was and is a substantial basis for it – it is a reasonable, not absurd, determination of policy.

Recent experience has more than validated the policy choices reflected in the supplemental jurisdiction statute. Congress has accumulated substantial evidence in the past six years documenting numerous problems with the current class action system which threaten the rights of both plaintiffs and defendants. *See, e.g.*, S. Rep. No. 108-123, at 2, 5-6 (2003) (summarizing the history of recent Senate hearings regarding class action reform); H.R. Rep. No. 108-144, at 7-8 (2003) (concluding, after a series of House Judiciary Committee hearings over the years, that there are "pervasive" abuses in state courts). In June 2003, the House of Representatives responded to these deficiencies by passing legislation expanding the right to remove class actions to federal court.[8] Recognizing that interstate class actions "deserve Federal court access because they typically affect more citizens, involve more money, and implicate more interstate commerce issues than any other type of lawsuit,"[9]

8. H.R. 1115, 108th Cong. (2003). *See also* 149 Cong. Rec. H5307 (daily ed. June 12, 2003) (passing by vote of 253-170). The United States Department of Justice and President Bush supported the legislation. *See Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the House Comm. on the Judiciary* 108th Cong. 6-7 (2003) (testimony of Viet Dinh, Assistant Attorney General at that time).

9. H.R. Rep. No. 108-144, at 6-7 (2003).

the legislation allowed federal jurisdiction over certain putative class actions so long as there is minimal diversity among the parties (including the unnamed class members). Jurisdiction lay regardless of each claimant's amount in controversy.[10]

Despite recent efforts at reform, the well-documented and long-standing problems in state court class actions persist. *See* Lisa Litwiller, *Why Amendments to Rule 23 are not Enough: A Case for Federalization of Class Actions*, 7 Chap. L. Rev. 201, 201-02 (Spring 2004) (stating that class action adjudications in state courts frequently contravene "basic fairness"); Martha Neil, *New Route for Class Actions*, 89-JUL ABAJ 48, 49 (July 2003) (noting the "widespread view" that the class action system is "badly broken and in sore need of fixing"). More than ever, expanded federal jurisdiction over class actions is needed to stop the "parade of abuses" facilitated by current diversity and removal standards. *See* S. Rep. No. 108-123, at 7; *see also* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case out Of It . . . In State Court*, 25 Harv. J.L. & Pub. Pol'y 143, 149-50 (Fall 2001) (discussing the "growing recognition" that federal court management of class actions is desirable).

First, some state courts have become magnets for class actions, effectively declaring themselves the national tribunals for such cases. A report by the RAND Institute for

10. The Senate Judiciary Committee favorably reported a comparable bill, *see* S. 274, 108th Cong. (2003), and a vote in the Senate may occur in the next legislative session. The actions of the House of Representatives and the Senate Judiciary Committee suggest that even if § 1367 had abolished the requirement of complete diversity, that would not be quite so "absurd" a result as petitioner claims.

Civil Justice ("RAND/ICJ") confirmed that these courts have attracted so many cases because they are more likely to certify nationwide classes than are other courts, federal or state. Exec. Summary, RAND/ICJ, *Class Action Dilemmas* 7 (1999); *see also* H.R. Rep. No. 107-370, at 17-18 (2002) (describing these disproportionate state court filings as a "race to the bottom"). For example, one state court judge certified almost as many classes during 1996-1997 as were certified during 1997 by all approximately 900 sitting federal district judges. *Id.* Since 1997, the flood of litigation filed in state courts known for a "lax" attitude toward class certification has continued. *See* H.R. Rep. No. 108-144, at 8, 11 (discussing the "mushrooming" numbers of cases filed in state courts); S. Rep. No. 108-123, at 14-23 (noting the "dramatic explosion" of class litigation in state courts and documenting numerous abuses).[11]

11. Madison County, Illinois often is identified as one of the "magnets" or "hotbeds" of class action activity in the state courts. Although it is home to less than one percent of the U.S. population, plaintiffs' lawyers filed over 100 new class actions in Madison County in 2003. *See* Brian Bruggemann, *Class-Action Lawsuits Set a Record*, Belleville News-Democrat (Jan. 2, 2004), *available at* 2004 WL 56695988. To put this in context, the class actions filed in Madison County *alone* equaled 40% of the total number of new diversity class actions filed in the *entire* federal system in 2003. *See infra* n.17. And almost all of those cases remain in the Madison County court, even though the Seventh Circuit does not follow *Zahn*, because plaintiffs' lawyers devise ways to block removal to federal court. *See* S. Rep. No. 108-123, at 11-12 (discussing how class lawyers use current jurisdictional rules to "game the system"). Indeed, President Bush recently traveled to Madison County and emphasized the need to address the ongoing class action problem there and in other state courts. George W. Bush, Address at the Gateway Center (Jan. 5, 2005), *available at www.whitehouse.gov/news/releases/2005/01/20050105-4.html* (last visited Jan. 6, 2005) (stating, *inter alia*, that federal court is the "proper place" for interstate class actions to be heard).

The Department of Justice likewise has recognized that certain state courts are much less likely than federal courts to afford defendants fair treatment. As then Assistant Attorney General Viet Dinh testified in May 2003, certain state and local courthouses have become "notorious for the ease with which they certify" class actions. *See Class Action Fairness Hearing*, *supra* n.8, at 6.

This abuse of class action litigation has inflicted serious burdens on defendants (including many of PLAC's corporate members), as well as on consumers.[12] Certification of a class alters the litigation, dramatically increasing the risks to the defendant and, consequently, escalating the incentives for settling even the most groundless actions. *Id.*; *see also Class Action Fairness Hearing*, *supra* n.8, at 6-7 (expressing the government's view in 2003 that these state court practices may unfairly "coerce" defendants to settle class litigation).[13]

12. *See, e.g., Class Action Jurisdiction Act of 1998, Hearing Before the Subcomm. on Courts & Intellectual Property of the House Comm. on the Judiciary on H.R. 3789* 105th Cong. 22-23 (1998) (attached March 5, 1998 testimony of John W. Martin, Jr. discussing the proliferation of class action litigation against the Ford Motor Company and others).

13. As one witness put it, "hundreds of frivolous lawsuits" are filed in favorable state courts and used as "high-stakes, court-endorsed blackmail devices" against companies. *See Mass Torts and Class Actions: Hearing before the Subcomm. on Courts & Intellectual Property of the House Comm. on the Judiciary* 105th Cong. (1998) (statement of Dr. John Hendricks); *cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995) (noting that a class certification order "often, perhaps typically, inflict[s] irreparable injury on the defendants").

Second, Congress has identified as another class action abuse, the filing of "copy cat" or duplicative class actions asserting similar claims on behalf of essentially the same people in different jurisdictions. *See* H.R. Rep. No. 108-144, at 15 (stating this practice was "far too prevalent" in state courts).[14] These "copy cat" actions often represent "blatant forum shopping" for a receptive judge who will quickly certify a class, but it is also common for enterprising class lawyers to file duplicative complaints in an effort to wrest control of class litigation from other lawyers who initiated it (thereby garnering a larger share of legal fees). S. Rep. 108-123, at 21. Because there is no mechanism for consolidating competing lawsuits filed in different states, litigants caught in the crossfire suffer staggering, yet unnecessary costs and burdens. *Id.* (noting that settlements of these overlapping actions often favor the class lawyers more than the putative class members).

Federal courts, in contrast, can manage "copy cat" class actions by transferring duplicative suits to a single court, *see* 28 U.S.C. § 1407 (providing for consolidation by the Judicial Panel on Multidistrict Litigation). Both the Senate and House Judiciary Committees therefore have concluded that allowing greater access to federal courts would help

14. For example, over 100 class actions were instituted against Wyeth following its withdrawal of certain diet medications from the market in 1997. *See In re Diet Drugs Phentermine, Fenfluramine, Dexfenfluramine Prods. Liab. Litig.*, MDL No. 1203, Civ. No. 99-20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000). Similarly, at least 105 class actions involving the diabetes drug Rezulin and over 100 involving automobile tires have been filed in recent years. *See* Lisa Girion *et al.*, *Pfizer Agrees to Settle Suit Over Diabetes Drug Rezulin*, L.A. Times, Dec. 22, 2001, at A1, *available at* 2001 WL 28938628; *Firestone Settles 40 Percent of Suits*, AP Online, July 23, 2001, *available at* 2001 WL 25486106.

prevent this type of wasteful tactical maneuvering and foster consistency in the treatment of class actions. S. Rep. No. 108-123, at 21; H.R. Rep. No. 108-144, at 15.

Third, review of the many class actions filed in state courts rebuts the "false federalism" concerns typically raised when Congress has considered expanding federal jurisdiction in this area. It does not promote federalism for one state to override the laws of another, yet that happens frequently in class action litigation. As former Solicitor General Walter E. Dellinger, III warned the House Judiciary Committee several years ago,

> many state courts faced with interstate class actions . . . have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles. . . . And because the state court decision has binding effect everywhere . . . the other states . . . have no way of revisiting the interpretation of their own laws.[15]

This type of interference by state courts with the laws of other jurisdictions has affected banks, manufacturers, insurance companies, and many other American businesses. S. Rep. No. 108-123, at 24; H.R. Rep. No. 108-144, at 14. The Commissioner of the District of Columbia Department of Insurance and Securities made clear the need to curb this judicial imperialism: "Large-scale nationwide litigation against major insurance companies frequently circumvents

15. *Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* 106th Cong. (1999) (statement of Hon. Walter E. Dellinger, III).

or simply ignores state insurance laws and the role of state regulators." *See Class Action Fairness Hearing, supra* n.8, at 12 (prepared statement of Lawrence H. Mirel). A class action system that allows one state court judge to dictate national policy on these and other important issues to forty-nine other states, offends basic principles of federalism.

Finally, many witnesses at recent congressional hearings have expressed concern that barring the doors of federal courts to most class actions exacerbates these problems. *See* S. Rep. No. 108-123, at 15 (noting that the "lack of a federal forum" for most class actions has led to the inconsistent administration of class actions in state courts); H.R. Rep. No. 107-370, at 14 ("Because the alternative Federal forum is not available, considerable class action abuse is occurring in many States courts."). As class action abuses have mounted, the resulting record discloses that "the public, the media, and experts" agree that reform is needed, and that "current practices are far from what the Framers envisioned." S. Rep. No. 108-123, at 26. Indeed, most class actions are precisely the type of cases that belong in federal court, especially considering the high stakes involved, the potential for local bias against out-of-state defendants, and the need to respect the policy choices of various states in large, multi-state class actions.

Echoing that view, the United States Court of Appeals for the Eleventh Circuit apologized to a defendant for remanding a large class action to an Alabama state court, noting that the state court "has on occasion produced gigantic awards against out-of-state corporate defendants." *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999). As the court observed, "[o]ne would think that this case is exactly what those who espouse the historical

justification for [federal diversity jurisdiction] would have had in mind," *id.*, but the current federal jurisdiction rules do not "adequately accommodate the reality of modern class action litigation," *id.* at 799 (Nangle, D.J., concurring).[16]

In sum, as the United States suggests in its *amicus* brief in the consolidated case, interpreting § 1367 in accordance with its clear language furthers at least two Congressional purposes: (1) promoting the "efficient resolution of disputes, both for parties and for the federal and state court systems"; and (2) providing a "neutral federal forum for the adjudication of substantial controversies involving diverse parties." *See* 2004 WL 2831810, at *26-28. Those purposes are even more important now than when the statute was enacted. Accordingly, this is *not* a situation in which absurd results could conceivably justify discarding the plain meaning of the statute. *Barnhart*, 534 U.S. at 459-61; *Rucker*, 535 U.S. at 134. To the contrary, the straightforward reading of the statute produces the right result, as a matter of law and as a matter of policy.

III. Section 1367 Has Not Caused A Flood Of Diversity Class Actions In The Federal Courts.

Some have suggested that the natural reading of the supplemental jurisdiction statute will deluge the federal courts with class action lawsuits. *See, e.g., Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 773 (11th Cir. 2004)

16. Similarly, in *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 305 (3d Cir. 1998) (Scirica, J.), the Third Circuit observed that "national (interstate) class actions are the paradigm for federal diversity jurisdiction," yet most such "class actions may be beyond the reach of the federal courts" under the current jurisdictional statutes.

(expressing concern about "open[ing] the doors" of the federal courthouse to "miniscule" claims) (Tjoflat, J., dissenting). Even if these institutional concerns could trump the plain language of the statute, they are not well founded. Section 1367 has been on the books for fourteen years. The first federal appellate court to read it as dispensing with the limits articulated in *Zahn* did so ten years ago. As of today, five other courts of appeal have agreed. Court statistics thus permit empirical verification of the dire predictions. In fact, they have not come true. The flood (or at least one that can be attributed to § 1367) has not happened.

Since 1990, the number of diversity cases by private litigants has not increased dramatically. Compared to 1990, the number of diversity cases brought in federal court has been *lower* in eleven (11) out of the thirteen (13) years during which the supplemental jurisdiction statute has been in effect. *See* Administrative Office of The United States Courts, *Judicial Facts and Figures*, Table 2.1, *available at www.uscourts.gov/judicialfactsfigures/table2.01.pdf* (last visited January 6, 2005). By contrast, the number of federal question cases filed in the federal courts by private parties has been *higher* in *each* of the past thirteen years than the number of such cases filed in 1990. *See id.* Thus, diversity cases today represent a *smaller* percentage of the overall federal docket than they did in 1990. *Id.*

In addition, there is no evidence that rulings by the lower courts extending supplemental jurisdiction in class actions have engendered disproportionate numbers of diversity class actions in those particular Circuits. *See* Underwood, *supra* n.5, 37 Akron L. Rev. at 707 (stating that "there have been no reports of mass filings" in the districts within the Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits); Rowe, *supra*

n.5, 74 Ind. L.J. at 64 (noting that despite court rulings exercising supplemental jurisdiction over below-limit claims, the "Republic has not tottered").[17]

The evidence that § 1367 has not inundated the federal court system with diversity cases accords with a realistic appraisal of the jurisdictional statutes. In the real world of class action litigation, § 1367 does not provide parties automatic admission to the federal courts. Thus, for example, several courts of appeal, while adopting the interpretation urged by respondents and PLAC here, nevertheless concluded for other reasons that federal jurisdiction was lacking in the case before them. *See, e.g., Gibson v. Chrysler Corp.*, 261 F.3d 927, 934, 940-43 (9th Cir. 2001) (holding that § 1367 overruled *Zahn*, but finding no federal jurisdiction in that action because the named plaintiffs failed to satisfy the amount in controversy requirement); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607-08 (7th Cir. 1997) (same). Further, Committees in both the United States Senate and House of Representatives recently have observed that, despite the holdings of most circuits extending supplemental jurisdiction over all class members' actions, relatively few diversity class actions "find their way into Federal court because plaintiffs offer named plaintiffs who do not have $75,000 claims or name a non-diverse plaintiff or defendant in order to prevent removal of the case to federal court." S. Rep. No. 108-123, at 12 n.32; H.R. Rep. No. 108-144, at 20 n.68.

17. The total number of new class actions brought in 2003 based on diversity jurisdiction (266) is either lower than or in line with previous years. *See* Administrative Office Of The United States Courts, *Judicial Business of the United States Courts 2003*, Table X-5, *available at www.uscourts.gov/judbus2003/appendices/x5.pdf* (last visited January 6, 2005).

If this Court rules, for all the Circuits, that § 1367 obviates the need for all class members to meet the jurisdictional amount threshold, presumably some additional class actions will proceed in federal court. But, if so, many would overlap and be consolidated with federal matters already pending. Because of the consolidation procedures in federal court, multiplicity of class actions is not the problem it is in the state courts. These cases generally end up being treated as one case in one court.

More importantly, a decade of experience simply provides no basis for alarm. Enforcing the plain meaning of the statute will not overload the federal judiciary. Section 1367 has not swung the gates to federal court wide open. Meaningful limits on federal jurisdiction over class actions have remained, and will remain after the decision in this case. *See also Jinks v. Richland County*, 538 U.S. 456, 459 (2003) (emphasizing that supplemental jurisdiction is discretionary and that federal courts need not (and will not) decide "every claim" satisfying the requirements of the statute).

CONCLUSION

For the foregoing reasons, the Court should affirm the Eleventh Circuit's ruling that there is federal jurisdiction over this case.

Respectfully submitted,

Of Counsel:

HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 22091
(703) 264-5300

ROBERT N. WEINER
Counsel of Record
MICHAEL C. AUGUSTINI
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Amicus Curiae

APPENDIX — PRODUCT LIABILITY ADVISORY COUNCIL, INC. LIST OF CORPORATE MEMBERS

3M
Altec Industries
Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.

Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Deere & Company
Delphi Corporation
Diageo North America Inc.
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.

International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
The Procter & Gamble Company
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation

Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
Snap-on Incorporated
Sofamor Danek
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive US LLC
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Zimmer, Inc.